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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF  
NEBRASKA, ET AL.,

*Appellants,*

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUB-  
LISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS

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# Supreme Court of the United States

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No. 312

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HARRY R. SWANSON, AS SECRETARY OF STATE OF  
NEBRASKA, ET AL.,

*Appellants,*

*vs.*

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF NEBRASKA

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## BRIEF OF APPELLANTS

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### REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED BY THE THREE JUDGE FEDERAL COURT BELOW

*Buck v. Swanson, et al.*, District Court, D. Nebraska, Lincoln Division, December 28, 1939. 33 Fed. Supp. 377 (R. Vol. I, 125).

Findings of Fact and Conclusions of Law, January 25, 1940 (R. Vol. I, 132-9).

Final Decree, January 25, 1940 (R. Vol. I, 139-141).



**KINDRED CASE APPEALED**

*Buck v. Gibbs*, District Court N. D. Florida, Gainesville Division, August 5, 1940. 34 Fed. Supp. 510. Appeals docketed No. 610 and No. 611, October Term, 1940.

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**KINDRED CASES UNAPPEALED**

*Buck, et al. v. Gallagher, et al.*, District Court, W. D. Washington, S. D., December 23, 1940. 36 Fed. Supp. 405. No appeal lodged.

*Buck v. Harton*, District Court, M. D. Tennessee at Nashville, February 19, 1940. 33 Fed Supp. 1014. No contest, counsel for defendants having "consented in writing" to the entry of the decree. No appeal.

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**STATEMENT AS TO JURISDICTION**

The jurisdiction of the Supreme Court of the United States to entertain this appeal is based upon Section 238 (3) of the Judicial Code (Section 345, Title 28, U. S. C. A.), which provides for a direct appeal to the Supreme Court of the United States when a state statute has been brought in issue in the federal court and its enforcement permanently enjoined as was done in this case by the three-judge court below. Section 266 of the Judicial Code (Section 380, Title 28, U. S. C. A.) provides that the hearing shall be held before a court comprised of three federal judges, when, as in this case, a state statute is sought to be enjoined. The three-judge court heard and decided the case and granted a permanent injunction against the enforcement of all parts of the state act in question.

No provisions in the final decree (R. Vol. I, 139) were made for modification to comply with subsequent state court interpretation of purely state matters involved, providing the final injunction was granted on a state question of "inducing cause" and "inseparability" of certain sections of the act in question, which were new issues brought into the case by the court.

Probable jurisdiction was noted herein by the Supreme Court of the United States on the 9th day of December, 1940, based upon a separate printed statement as to jurisdiction filed in accordance with Supreme Court Rule 12. That jurisdictional statement contained per curiam opinion (R. Vol. I, 121), injunctive order (R. Vol. I, 123), opinion on merits (R. Vol. I, 125), findings of fact and conclusions of law (R. Vol. I, 132), final decree (R. Vol. I, 139), motion for new trial (R. Vol. I, 141), affidavits in support (R. Vol. I, 160-162), order overruling motion for new trial (R. Vol. I, 162), and legislative bill in question (R. Vol. I, 74-88).

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**STIPULATION THAT THE AMOUNT INVOLVED  
DOES EXCEED \$3,000 PLUS INTEREST AND  
COSTS (R. Vol. I, 168)**

**KINDRED CASES ON JURISDICTIONAL AMOUNT**

*Gibbs v. Buck*, 307 U. S. 66, 59 S. Ct. R. 725, 83 L. Ed. 1111.

*Buck v. Gallagher*, 307 U. S. 95, 59 S. Ct. R. 740, 83 L. Ed. 1128.

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### STATEMENT OF THE CASE

This action in equity was filed by the plaintiffs and appellees in the United States District Court, for the District of Nebraska, Lincoln Division, on June 8, 1937 (R. Vol. I, 1-34), seeking to enjoin the enforcement of a Nebraska legislative anti-monopoly act, which became effective May 17, 1937. These plaintiffs below were the American Society of Composers, Authors and Publishers, called ASCAP, organized under the laws of the State of New York. This organization is officered by a board of directors, and all its members are composers of copyrighted musical compositions and publishers of such copyrighted musical compositions. Among the plaintiffs below also were some publisher members from New York and some composer members from New York and Maine. The defendants were all law enforcement officers of the State of Nebraska.

No action was taken in the state courts of Nebraska by either party, and no construction was placed on the particular statute in question by any court of the state, nor did the final decree contain any provision that further relief might be had upon an appropriate showing that the state court had construed the statute or determined the question of its validity under state law in a manner inconsistent with the decision of the three-judge federal court appealed from herein (Final decree, R. Vol. I, 139).

Appended to the *bill of complaint* filed (R. Vol. I, 1) were all the typical contracts which ASCAP had entered into with the other plaintiffs and all the other members of the society, both composer members and publisher

members (R. Vol. I, 36-45); and all typical contracts with all of the users of the ASCAP music in Nebraska (R. Vol. I, 88-97); and also ASCAP articles of association (R. Vol. I, 46-74); together with a copy of the Act (R. Vol. I, 74-88).

ASCAP deals exclusively in what is known as the small rights for profit of public performance of music played or sung in public. The Copyright Act [Title 17, U. S. C. A., Sec. 1, (e)] grants to the copyright owner the right to receive pay for such public performances.

The bill of complaint, and exhibits made a part, admitted that ASCAP had assigned to it from each member the exclusive power to fix prices, control terms, and collect the money for these public performance licenses everywhere, including the State of Nebraska, and distribute it as dividends to the members (Opinion, R. Vol. I, 125; Findings of Fact, R. Vol. I, 132).

Interlocutory injunction was granted on November 13, 1937, in favor of the appellees and plaintiffs below; likewise a motion to dismiss (R. Vol. I, 98) filed by the appellants and defendants below, was overruled on the 13th day of November, 1937. Exceptions were filed thereto on the 18th day of November, 1937 (R. Vol. I, 102).

No appeal was prosecuted from either of these orders; and, except for an assignment of error (R. Vol. I, 113) based upon the Court's error in overruling the motion to dismiss based upon the petition and exhibits attached to it, none of said matters are before this Court on this appeal.



The court that heard the foregoing matters, and all subsequent matters, was a three-judge Federal court consisting of United States Circuit Judge, Hon. Archibald K. Gardner, and two United States District Judges, Hon. Thomas C. Munger and Hon. James A. Donohoe (Sec. 266 of the Judicial Code; Sec. 380, Title 28, U. S. C. A.).

The appellees stated as the basis for their action that the entire Nebraska statute deprived all the plaintiffs of the rights granted to them under the Copyright Act and was in violation of Article I, Sections 8, 9, and 10; Article III, Section 2; Article IV, Section 2; and Article VI, Section 2 of the Constitution of the United States; and the Fourteenth Amendment to the Constitution of the United States; and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25 of the Constitution of the State of Nebraska (Bill of Complaint, R. Vol. I, 34).

The *answer* was filed on the 18th day of November, 1937 (R. Vol. I, 103). In that answer, the appellants denied that the Nebraska Act was in violation of said provisions, or any of them, but instead was a proper exercise of the Nebraska legislative authority under the police power of the State declaring as unlawful any association of a substantial number of composers and publishers who combine for the purpose of fixing prices for public performance, if in restraint of trade, and providing the usual, ordinary penalties for violations thereof similar to the other anti-monopoly statutes of the State (Chap. 59, Comp. St. Neb. 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance

Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Art. 11, Protection of Trade-marks, Brands and Names).

Much evidence, oral and documentary, was taken at the trial on September 18th to 21st, 1939, and many depositions (R. Vol. II, 611-777) and interrogatories (R. Vol II, 885-1027) were there introduced. A bill of exceptions or transcript of the oral testimony was taken and transcribed by the official court reporter and was submitted and filed with the court shortly after the hearing (R. Vol. I, 168-466).

On December 28, 1939, the three-judge court entered its opinion (R. Vol I, 125) wherein it held that because Section 2(B) of the Nebraska Act (R. Vol. I, 79) was a violation of the National Copyright Act therefore the whole act must fail because that subsection was inseparable from the balance of the act and was the inducing cause for its passage (R. Vol. I, 130-131). The opinion ordered the plaintiffs and appellees to prepare findings of fact, conclusions of law, and decree *in accordance with that opinion* (R. Vol. 1, 132).

The findings of fact, conclusions of law, and decree were signed and filed by the three-judge Federal court on the 25th day of January, 1940 (R. Vol. 132). The findings of fact made no reference to Section 2 (B) as the inducing cause and inseparable from the balance of the act, as found in the opinion, but declared the entire act non-enforceable without stating that the act was

in violation of any Federal or State Constitution or the National Copyright Act, as did the opinion confined to Section 2 (B) of the Act (Opinion, R. Vol. I, 125; Findings of Fact and Conclusions of Law, R. Vol. I, 132-139).

The opinion and findings, however, did find extensive, definite facts in connection with the activities of ASCAP, and did find that it was a monopolistic combination; that it did fix and control prices, and controlled substantially all the commercially usable public performance rights of copyrighted vocal and instrumental musical compositions used in Nebraska; and that said ASCAP was operating through its authorized agents and representatives within the State of Nebraska, and thus carried on its activities therein; that the composer plaintiffs and appellees and publishers were acting in the State of Nebraska only by virtue of their membership in the ASCAP association, but had no direct dealings of any kind in the State, they having assigned their exclusive rights in public performance for profit to ASCAP.

On the 5th day of February, 1940, the defendants and appellants filed a motion for new trial or to correct the said opinion, findings, conclusions, and decree in the matters specifically referred to in the motion (R. Vol. I, 141).

On the 25th day of March, 1940, a rehearing was granted by the said three-judge Federal court; and on March 28, 1940, the said motion to correct the decree or to grant a new trial was overruled (R. Vol. I, 162).

On June 27, 1940, there was presented to the Hon. Thomas C. Munger, Judge of the United States District Court, one of the three Federal judges, a Petition

for Appeal (R. Vol. I, 110) together with Prayer for Reversal and Dismissal, Assignment of Errors and Brief (R. Vol. I, 113), Cost Bond (O. R. 124) and Citation (O. R. 123). On June 27, 1940, an order allowing that appeal was duly signed by that Judge (R. Vol. I, 112) (Rule 36 of U. S. Supreme Court). All said papers were on June 27, 1940, filed with the Clerk of the United States District Court at Lincoln, Nebraska.

The return of the service of the citation was filed within five (5) days with the Clerk of the United States District Court and is shown of record in this appeal (R. Vol. I, 165).

The *prayer in the petition for appeal* (R. Vol. 110-112), requested that the appeal be granted, which was done on said date by order allowing the appeal (R. Vol. I, 112), as above referred to; and also prayed that citation issue to all the plaintiffs and appellees; and that said cause upon appeal be reversed, and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs; and for such other and further relief as may be deemed just and equitable in the premises.

The Court in its opinion of December 28, 1939 (R. Vol. I, 125) found the following facts as distinguished from the law:

"There are approximately 1,000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal publishers of the country. Each member has assigned to the society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of



five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

"In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at sometime during the year attend dances and balls where music is played. In 1938 approximately \$12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about \$26,000.00 to the society annually. Another group of stations paid the society about \$27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately (2) \$70,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some \$6,000,000.00 was taken in for public performance rights by the society



in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

"All the contentions of plaintiff, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but the single question is the constitutional validity of the challenged statute.

"It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, were unable to ascertain who

the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized." (Continued on page 22 hereof.)

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The findings of fact the Court ordered to be prepared by appellees, dated January 25, 1940 (R. Vol. I, 132-9) are as follows:

"1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the 'Statute.'

"2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

"3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

"There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who

constitute some of the principal publishers of the country.

"Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

"5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society \$68,769.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all of their own vocal and instrumental musical pro-

grams. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately \$12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approximately \$48,700.

"The largest radio station in the State pays about \$22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about \$21,700 in 1938. The cost of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

"6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some \$6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

"7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and



to enforce their rights by means of litigation. Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

"8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

"9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the question raised by the Bill of Complaint are of common and general interest to all the members of the Society who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

"10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

"11. The Society has control of from 85 to 90% of the popular music necessary for the successful

operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

"12. The contracts between the individual composer and author members of the Society, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

"13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

"14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

"15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with

any State Authority, copies of the respective compositions copyrighted by their respective members.

"16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

"17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

"18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and broadcasting stations.

"19. The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including pub-

lisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

"20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

"21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska."

"22. Complainants have no adequate remedy at law and are relievable only in this court of equity."

#### **Conclusions of Law of January 25, 1940**

"I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either



of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants; their representatives or agents, or any of them, for violating any provision of said statute.

"II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

"Let decree be entered accordingly.

"Dated January 25, 1940.

"By the Court:

(S.) ARCHIBALD K. GARDNER,  
*U. S. Circuit Judge;*

THOS. C. MUNGER,  
*U. S. District Judge;*

J. A. DONOHUE,  
*U. S. District Judge."*

Filed in Lincoln Division, Jan. 25, 1940.

**Final Decree (R. Vol. I, 139)**

"This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon the court having made its Findings of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937, be and the same is hereby made permanent and perpetual.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought directly or indirectly any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the

Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of \$\_\_\_\_\_, and now here decreed to the complainants, and that if the same be not paid within thirty days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,  
*United States Circuit Judge.*

THOS. C. MUNGER,  
*United States District Judge.*

J. A. DONOHUE,  
*United States District Judge."*

The balance of the opinion, concerning the law of the case (R. Vol. I, 128-132) filed December 28, 1939, is in material conflict with the conclusions of law above quoted, dated January 15, 1940 (R. Vol. I, 139). (Continued from page 12 hereof.)

Herewith, we quote verbatim the law as announced in the said opinion (R. Vol. I, 128):

"The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. *Nebbia v. New York*, 291 U. S. 502; *Waters-Pierce Oil Co. v. Texas*, 197 U. S. 115; *Dayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Paramount Pictures v. Langer*, 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A state statute, though enacted in pursuance of the police power, is void if in contravention of any excess provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

"The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforceable rights to authors and publishers without burdensome requirements, in order to af-



ford greater encouragement to the production of literary works of lasting benefit to the world. *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

"It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or plate used for printing. *King Features Syndicate v. Fleischer* (C. C. A. 2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. *United States v. Dubilier Condenser Corp.*, 289 U. S. 178; *United States v. American Bell Telephone Co.*, 167 U. S. 224; *Burrow-Giles Lithograph Co. v. Serony*, 111 U. S. 53; *American To-*

bacco Co. v. Werckmeister, 207 U. S. 284; Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., (C. C. A. 7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In American Tobacco Co. v. Werckmeister, *supra*, it is said:

“ \* \* \* the law recognizes the artistic or literary production of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.’

“While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., *supra*,

“ ‘The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.’

“The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co.

(D. C. Mass.), 27 Fed. (2d) 556; American Tobacco Co. v. Werckmeister, *supra*.

"Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, 'the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes.'

"The rights of public performance in connection with the composition include separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

"Section 2 (B) of the statute provides that,

" 'In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by

such copyright proprietor or owner in any court within the boundaries of this state.'

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U. S. 613.

"While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

"The state statute contains a separability provision (Section 12), which provides that,

" 'If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.'

"The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. *First Trust Co. v. Smith*



(Neb.), 277 N. W. 762; *Lavery v. Cochran* (Neb.), 271 N. W. 354; *Hubbell Bank v. Bryan* (Neb.), 245 N. W. 20. In *Lavery v. Cochran*, *supra*, the court in speaking of a severance clause contained in a statute said:

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. *State v. Ure*, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

"But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable."

"In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties."

"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

#### **No Issue Raised on Separability and Inducing Cause**

Nowhere in the pleadings nor in the issues in the case was the question raised that Section 2 (A) or Section 2 (B) of the act in question were the inducing causes and inseparable from the balance of the act. That issue came as a surprise as did other matters that were contained

in the findings of fact and conclusions of law and which were not in the issues in the evidence nor in the opinion. These inconsistencies and illegalities in the decree were attempted to be corrected by a timely motion for new trial which was entertained by the Court.

**Defendants' Motion for New Trial with 22 Affidavits Attached (R. Vol. I, 141-162).**

Filed with Return of Service in Lincoln Division, February 5, 1940. Here follows the motion verbatim:

**I.**

"The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

- (1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and
- (2) In pursuance of said Rule 59,
  - (a) Amend the Findings of Fact; and
  - (b) Make additional Findings of Fact; and
  - (c) Amend the Conclusions of Law; and
  - (d) Amend and direct the entry of a new Decree; and
- (3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39 (R. Vol. I, 125), with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40 (R. Vol. I, 132); and
- (4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or
  - (a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and
- (5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition

or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

- (a) The record as made; and
- (b) The showing accompanying this motion; and
- (c) The law applicable to the issues involved; and
- (d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

## II.

Regarding Defendants' Lack of Opportunity to Object to the Final Opinion, Findings, Conclusions, and Decree.

The defendants state that the opinion of the Court of 12/28/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defendants' cause.

## III.

Defendants' More Specific Statement of the Grounds Set Forth in Paragraph I above for Setting Aside Certain Findings of Fact, and Amending Others, and Making Different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following which should be stricken (R. Vol. I, 127):

"Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, \* \* \*"

The question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Pages 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39 (R. Vol. I, 129), appears:

"The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act (R. Vol. I, 74).

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights (R. Vol. I, 130). These definitions do not coincide



with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accordance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6 (R. Vol. I, 130), the following:

"The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Nebraska (R. Vol. I, 78). The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) (R. Vol. I, 79) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same," which language is copied verbatim from the National Copyright Act, Title 17, U. S. C. A.

5. Strike from page 7 of the opinion of 12/28/39, the following language (R. Vol. I, 131):

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding in reference to the National Copyright Law, which is as follows:

"As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39 (R. Vol. I, 131) is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

6. Strike from page 7 of the opinion the following (R. Vol. I, 131):

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 (R. Vol. I, 126-8) that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of pages 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted. (Omitted in printing.)

7. Strike the reference to Section 2 (B) on page 6 of the opinion of 12/28/39 (R. Vol. I, 130-2), and on through to the end of the opinion on page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this motion and attached hereto as Exhibits 1 to 22 and made a part hereof (R. Vol. I, 160-2). If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features of L. B. 478, as defined in Section 1 of said Act (R. Vol. I, 74), because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be



stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of the Act (R. Vol. I, 78-9).

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold (R. Vol. I, 132):

"The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts."

and therefore

"the whole act must be held inoperative."

The contrary now appears of record by said affidavits of the legislators attached (R. Vol. I, 160-2). Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows (R. Vol. I, 132):

"Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."



This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39 (R. Vol. I, 125; R. Vol. I, 133).

#### IV.

The following should be stricken from the Final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference to L. B. 478 to be printed in the footnotes. The entire act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations," and the words "authors, composers, and publishers" stricken, so that the same shall properly read (R. Vol. I, 133):

"Its membership consists of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following (R. Vol. I, 134):

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) (R. Vol. I, 36-7) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows (R. Vol I, 135):

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk." ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

"The cost of operation of the Society is approximately 20% of the gross amount received" (R. Vol. 1, 135).

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs (R. Vol. II, 913-914). There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights of the defendants; or, the Court, under permissive Rules 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following (R. Vol. I, 135):



"Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions."

Further on in the paragraph, there should be stricken:

"and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily" (R. Vol. I, 136).

and also, there should be stricken:

"and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

There was no evidence introduced on this subject of any probative force, or of evidenciary value; the same was only casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact (R. Vol. I, 136-9).

8. Paragraphs 9, 12, 13, 14, 15, 16, 17, 19 and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise "sales talk" and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.



9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all (R. Vol. I, 74-87).

#### V.

The Conclusions of Law of the Court (R. Vol. I, 139), filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein. (These conclusions proposed below are omitted from the printed record.)

The Decrees (R. Vol. I, 139) should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is nonenforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is non-enforceable. The same might be true of other sections,

such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

## VII.

The defendants move the court to amend its findings of fact to include the following important and material matters clearly and unmistakably in the record:

1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not (R. Vol. I, 396, 428); that blanket licenses only are demanded by and acceptable to ASCAP (R. Vol. I, 402, 407); that ASCAP refuses radio users a per-piece or per-program charge based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk (R. Vol. I, 408) (R. Vol. II, 814); that such conduct is discriminatory and unfair to music users (R. Vol. I, 409); that repeated demands for per-piece or per-program rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony) (R. Vol. I, 407, but ASCAP insists, and enforces through its monopolistic control (R. Vol. II, 794-6), the blanket license which it demands and which is

based upon percentage of gross business done plus a sustaining fee, irrespective of the program (Radio station contracts in evidence) (R. Vol. I, 408-10; Ex. F, R. Vol. I, 89).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP (R. Vol. II, 861-866).

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringement. (See Columbia and National contracts in evidence.) (R. Vol. I, 791.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theater contracts in evidence.) (R. Vol. I, 94.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of ASCAP (Malec, Hedlin testimony and contracts in evidence) (R. Vol. I, 96; R. Vol. II, 852 A, B).

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP to protect the same or go out of existence as music users at great inconvenience and loss (Malec, Gillin, Hedlin, and Searle testimony) (R. Vol. I, 367).

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin) (R. Vol. I, 441-2), nor does the National Hotel Association speak for the hotels (Hedlin) (R. Vol. I, 448) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state (Blazer testimony) (R. Vol. I, 469).

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher (R. Vol. I, 36, 37, 42), and are placed in a classification in which the first group, of about 50 composers, receive as much as \$17,500 per year (R. Vol. I, 203-212) and the publisher members in the first group \$150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Caesar Deposition) (R. Vol. II, 630-1); and through the scheme of the publisher members taking one-half of the profits and the selected classification [By-Laws (R. Vol. I, 64-5; 70) Complaint] of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive \$50,000 a year salary and bonuses of \$5,000 to \$8,000; that \$30,000 a year rent is paid in New York for the headquarters (Buck) (R. Vol I, 208; 262); that ASCAP is a substantial business



organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name appears on all the contracts for ASCAP (R. Vol. I, 469; Vol. II, 815).

10. That the purpose of showing that there were 284,000 radio sets in Nebraska (Gillin) and 24 hotels (contracts) and 10 radio stations, and that a third of the population at some time during the year entertained itself in dancing; and that there are 350 dance halls and music rooms in the State of Nebraska (Malec), is to prove the matter of the public interest in the matter of copyrighted music within the State of Nebraska; and defendants are entitled to such finding because the evidence so shows (R. Vol. II, 797; Vol I, 367; Vol I, 362).

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP [Contracts (R. Vol. II, 791); Mills] (R. Vol. I, 263); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact) and which may be found in the proposed Findings of Fact set out on pages 13 to 29 inclusive of the defendants' findings sub-

mitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein (Omitted in printed record).

### VIII.

As a Further Grounds for this Motion for New Trial, the Defendants Move the Reconsideration and Adoption by the Court of the Conclusions of Law and the Authorities in Support Set Forth on Pages 30 to 43 Inclusive of the Defendants' Proposed Conclusions Dated 10/4/39 (Omitted in printed record).

### IX.

In Reference to the Interference of the Nebraska Act with the National Copyright Law, and Therefore Unconstitutional, the Defendants move for the correction and additions to the Findings of Fact, conclusions of law, and decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use by the individual. Defendants contend that a monopolistic organization such as ASCAP

has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico-musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition) (R. Vol. II, 698-705), received \$50,000 for one of her father's rights for dramatico-musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2c per each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2c per roll must be collected and fixed by the composer by the National law (R. Vol II, 701).



4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions, including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) (R. Vol. II, 755-6) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher (R. Vol. II, 643-4). That is immaterial to this case, ASCAP not being interested therein, and that



transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights." That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence (R. Vol. I, 797-803; 36-37-42). Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or ~~2~~ (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any one or all of the rights above granted,—and so far as public performance rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance,—is that the objection? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic

practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented (17 U. S. C. A. Sec. 1).

7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some \$6,000,000 per year, and in the State of Nebraska to \$70,000 or more per year (R. Vol. II, 833; Vol. I, 27; 210-11).

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance (R. Vol. I, 78).

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish—then and only then—to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett (R. Vol. II, 688-693; 699-705), she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and de-

terminated ahead of time. The Nebraska Act would not stop that. She received \$50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2c per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2c per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold,—and if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received \$10,000 directly from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 \$7,500 for those rights. If she wished to charge \$5.00, or \$10.00, or \$1.00 per copy for those sold in Nebraska for that purpose, she could do so; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.



10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A) (Omitted in printing).

### X.

In Reference to Additional Testimony Under Rule 59 and 52, to Bring Out All Phases of the Various Public Performance Rights, Defendants Move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 (R. Vol. I, 125; 132) and in its finding of 1/25/40, erroneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39 (R. Vol. I, 128-132), and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40 (R. Vol. I, 137-8), are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.



3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

## XI.

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly (R. Vol. I, 78-9).

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its constitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation (R. Vol. I, 74).

## XII.

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39 (Omitted in printing), and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" reference in the Findings (Par. 21, Page 7, Findings of 1/25/40) should be stricken (R. Vol. I, 138).

## XIII.

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading of the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L. B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases (R. Vol. I, 78-9).

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except

said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section 2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court (R. Vol. I, 74-88). Certainly there was no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his publisher the right to collect themselves for public performance rights if they wished (R. Vol. I, 78-2A). If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants-appellants wish the Court to reconsider. But even if all of Section 2, including 2 (A), is classified as nonenforceable with 2 (B) and 2 (D), defendants submit that the Act, L. B. 478 (R. Vol. I, 78-80) shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted,"

(Signed by attorneys for defendants below and appellants herein.)

**Affidavit in Support of Defendants' Motion for New Trial**

"STATE OF NEBRASKA,"

*County of Douglas, ss:*

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted

for the final passage of L. B. 478 (R. Vol. I, 74-88); that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25c per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorporated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held nonenforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be grant-



ed to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 30th day of January, 1940.

HAROLD A. MOORE,

(SEAL)

*Notary Public.*"

My commission expires January 28, 1943.

### Certificate

"I, Grace A. Bowen, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to

the Motion for New Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(S.)

GRACE A. BOWEN,

(SEAL)

*Notary Public."*

Dated: February 3, 1940.

Name	Date Signed and Acknowledged	County	Notary
Armstrong, Robert M. Exh. 1	1-30-40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2	1-30-40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3	1-29-40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4	1-31-40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5	1-31-40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6	1-30-40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7	1-30-40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8	1-31-40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9	1-30-40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10	1-30-40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11	1-31-40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12	1-31-40	Washington, D. C.	Helen A. Bonorden
Peterson, Carl H. Exh. 13	1-29-40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14	1-30-40	Saunders, Nebr.	C. N. Walton
Regan, R. O. Exh. 15	1-30-40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16	1-30-40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17	1-31-40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18	2-1-40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19	1-30-40	Douglas, Nebr.	Harold A. Moore
Tvrdek, Charles F. Exh. 20	1-31-40	Douglas, Nebr.	Otto Smolek
Von Seggern, E. M. Exh. 21	1-31-40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22	1-31-40	Jefferson, Nebr.	E. R. Bee

(Service duly acknowledged on February 5, 1940.)

The order overruling the motion for new trial is as follows:

"The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) ARCHIBALD K. GARDNER,  
*United States Circuit Judge;*  
THOMAS C. MUNGER,  
*United States District Judge;*  
J. A. DONOHOE,  
*United States District Judge."*

The following assignments of error (R. Vol. I, 113-121) were filed below and docketed with the appeal papers on June 27, 1940, and are verbatim:

I.

"The Court erred in holding in its opinion of December 28, 1939 (R. Vol. I, 125), that Section 2 (B) of the Nebraska statute in question (Session Laws 1937, Chap. 138, page 488) was the inducing cause for its passage and inseparable from the balance of the Act, and therefore the entire Act was nonenforceable, because it affirmatively appeared from the Act itself (R. Vol. I, 79) that said subsection might be stricken and the balance of the Act would be full, complete, enforceable, and independent of said alleged objectionable clause or clauses in Section 2.

## II.

The Court erred in refusing to correct its decree on rehearing when it then affirmatively appeared by the affidavits of a majority of all the legislators (R. Vol. I, 160-2), each of whom voted for the Act, that the said objectionable section [Section 2 (B)] together with Subsections 2 (A) and 2 (D) had no influence whatever upon them in their affirmative vote; and that neither of said subsections were the inducing cause for the affirmative vote of any one of said legislators.

## III.

The Court erred in granting the permanent injunction *after it had found* in its opinion of December 28, 1939, that the *following facts* [(a) to (n)] *had been established* by competent evidence at the trial (R. Vol. I, 125-132):

- (a) That the appellee ASCAP was made up of 1,000 music composer members and 123 music publisher members; that these music publisher members constituted substantially all of the music publishers in the United States.
- (b) That ASCAP was likewise affiliated with 44,000 foreign composer members throughout the world whose music was exclusively controlled in the United States by ASCAP.
- (c) That ASCAP actually did control from 85% to 90% of the popular copyrighted vocal and instrumental musical compositions and from 50% to 75% of the standard or older music used in Nebraska and elsewhere throughout the United States.
- (d) That the users of music in the State of Nebraska, including radio stations, dance halls, hotels, theaters, and places of amusement must



necessarily, for the successful operation of their business, deal with ASCAP.

- (e) That there was no place, or person, or agency to whom the users of music in Nebraska might go in order to deal for the public performance rights in any substantial amount sufficient to meet the ordinary needs of users in the state, except ASCAP.
- (f) That the appellees, and all other members of ASCAP had assigned in writing to it the exclusive right to all their public performance rights.
- (g) That the collections were made in the State of Nebraska by ASCAP of at least \$70,000 annually; that the same was distributed, after the expense of operation, one-half thereof to the publisher members and one-half thereof to the composer members, classified by a self-perpetuating board of directors of ASCAP, as shown by their articles of association attached to their bill of complaint and in evidence.
- (h) That the public was interested because there were in Nebraska 350 dance pavilions and ball-rooms, independent of taverns, where dancing was carried on incidentally; that there were ten radio stations operating within the state, all dealing with ASCAP, and one of which stations was affiliated with the Columbia Broadcasting Network and the other with the National Broadcasting Network; that there were a large number of theaters as users of ASCAP music, and 284,000 radio receiving sets in private homes that listened to ASCAP music from the ten radio stations; that about one-third of the population of the state at one time or another during the year attended dances and balls where ASCAP music was played.
- (i) That the theaters paid to ASCAP approximately \$12,000 per year at ten to fifteen cents per seat per year; that the largest radio stations each

paid \$22,000 or more per year to ASCAP; that there were 391 signed contracts in evidence with users in the state in which ASCAP, through its Nebraska representatives and agents, was the licensor and recipient of all the collections.

- (j) That the exclusive right to make collections, to fix all prices, and to carry on all the public performance rights of all the copyrighted musical compositions of all its members was vested by each member in ASCAP under contracts in evidence.
- (k) That throughout the nation some \$6,000,000 was collected annually, of which approximately 20% was to pay the overhead expense of ASCAP; and that Nebraska users paid their proportionate part of that sum.
- (l) That the protection by ASCAP of the legal rights by infringement suits for the members of their copyrighted musical compositions, which the individuals could not as readily carry on or detect themselves, would not authorize the monopolistic practices nor curtail the exercise of the police power of the State of Nebraska to prevent the unlawful monopoly of ASCAP.
- (m) That the National Copyright Act (Title 17 U. S. C. A., Sec. I) gave no right to copyright owners to combine with other copyright holders to insure control of prices and the consequent power of monopoly of an entire field.
- (n) That the necessity urged by the appellees as a justification or warrant for their organization was of no avail as a defense.

**EXPLANATION:** (All the foregoing facts were found by the Court in its opinion of December 28, 1939 (R. Vol. I, 125), and also in the findings of fact of January 25, 1940 (R. Vol. I, 132.))

## IV.

The Court erred in finding in its opinion of December 28, 1939, that Section 2 (B) (R. Vol. I, 78) was the inducing cause for the passage of the entire Act and was inseparable from the balance thereof, when that issue was not pleaded and was not raised in any manner at the trial by either the appellees or the Court upon its own motion during the trial.

## V.

The Court erred in granting a permanent injunction (R. Vol. I, 139) against the enforcement of Sections 1, (not 2), 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act in question (R. Vol. I, 74-88), when said sections merely declared the announced rules of law universally applied in Nebraska against all unlawful monopolistic combinations [Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Chap. 59, Art. 11, Protection of Trade-marks, Brands and names].

## VI.

The Court erred in failing to apply the announced principle of law in Nebraska that:

“Although a statute may be invalid or unconstitutional in part, the other parts will be sustained, where they can be separated from the part which is

void" (*Laverty v. Cochran*, 132 Neb. 118, 271 N. W. 354).

#### VII.

Furthermore, the Court erred in holding in its opinion that Section 2 and its subdivisions (B) and (A) (R. Vol. I, 378) were in themselves violative of the National Copyright Act (17 U. S. C. A., Sec. I) because the said sections and subsections were obviously enlargements to and permissive additions to the National Copyright Act, rather than in derogation thereof, and were enacted as a proper and legal exercise of the police power of the Legislature of the State of Nebraska to protect its citizens against fraud and unlawful practices of ASCAP when dealing in the public performance rights for copyrighted musical compositions.

#### VIII.

The Court erred in granting the permanent injunction when the appellees had a plain, adequate, and speedy remedy at law, and especially so when the enforcement provisions of the Act, to wit, Sections 9, 10, 11 and 13 provide for full and complete hearings in the regularly constituted courts of the state and no summary action was permitted under the terms of the Act (R. Vol. I, 84-7).

#### IX.

The Court erred in granting the permanent injunction (R. Vol. I, 139) because in doing so it violated the well-established principle of law announced by the Supreme Court of the United States that the limited individual monopolies granted to patent or copyright owners



do not exempt them from the prohibitions of anti-trust legislation when it appears that the combining patent or copyright owners effectively dominate industry, because the power to fix royalties for licenses is tantamount to the power to fix prices in violation of the anti-trust legislation (R. Vol. I, 125, Par. 4-6).

**EXPLANATION:** (Only in the Court's opinion (R. Vol. I, 125) of December 28, 1939, was the entire Act held void because of the invalidity of Section 2 (B) as above set forth. In the findings of fact, conclusions of law, and decree (R. Vol. I, 132-9) of January 25, 1940, the entire Act was held invalid and non-enforceable although no part thereof was held repugnant to the Copyright Law, and no mention or reference was made to Section 2 (B), as the only invalid part, as was done in the opinion of December 28, 1939; and no determination of unconstitutionality made in said papers of 1/25/40 (R. Vol. I, 132-9).

Thus appellants now proceed with the following assignment of errors based upon omissions in the findings of fact, conclusions of law, and decree of January 25, 1940).

## X.

The Court erred in failing to find in its findings of fact (R. Vol. I, 132) of January 25, 1940, the following additional, definitely proven, material matters appearing of record because the omission thereof affected the material rights of the appellants on the issue of monopolistic practices amounting to fraudulent practices indulged in by ASCAP:

(These facts are indexed to the printed transcript of record before this Court.)

- (1) That, contrary to its claim of being a protective association for its members, ASCAP is a very

substantial business organization paying \$30,000 a year rental for its New York office (R. Vol. I, 262).

- (2) That it pays each of its officers Buck and Mills \$50,000 annually together with large bonuses and other emoluments, and to its secretary Paine \$25,000 per year (R. Vol. I, 208; 211).
- (3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance of ASCAP compositions as are reproduced or presented originally in the Nebraska studios (R. Vol. I, 263).
- (4) That the entire operations of ASCAP are so carried on as to be within the state as intrastate transactions obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (R. Vol. I, 263; 398-403; 455-8).
- (5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP on ASCAP'S terms (R. Vol. II, 861-866).
- (6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (R. Vol. I, 443; 367-8; 380-6; 396-8).
- (7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (R. Vol. I, 365-7; 397-400; 410-12).

- (8) That the classification committee of ASCAP (Its Art. of Assoc., (R. Vol. I, 64; 70)) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money (R. Vol. I, 203-9); that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music (R. Vol. I, 201-206; 64; 70).
- (9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts, no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (R. Vol. I, 396; 428; 402; 407; 408; Vol. II, 814, 794-6).
- (10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might protect himself against an innocent infringement in his establishment (R. Vol. I, 447; 403).
- (11) That the facts admitted by appellees in their petition (R. Vol. I, 1-36; 36-97) and by their exhibits attached and made a part thereof, when applied to the Act also set forth in the petition, were sufficient admissions of facts by appellees to legally ground an order of dismissal moved for by the appellants in August of 1937 (R. Vol. I, 98 to 102), but overruled on November 13, 1937, and to which exceptions were taken and filed on November 18, 1937 (R. Vol. I, 102).

## XI.

The Court erred in its opinion of December 28, 1939, when commenting upon Section 2 (B), which applied

separately to the *individual* composer and his publisher, as specifically set forth, by holding (R. Vol. I, 131):

"While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act,"

because Section 2 (A) (R. Vol. I, 78) of the Act provides that the said individual composer and his publisher *may, only if he or they wish*, grant public performance rights, and when they do shall fix the price therefor upon their music when sold, and collect for it in the same manner as they do for their royalties on all sheet music; and because Section 2 (C) (R. Vol. I, 79) protects the individual copyright owner by prohibiting others from publishing, copying, vending, or selling the composition containing the public performance rights to others when so purchased, with full protection of the National Copyright Law specifically provided in Section 2 (A) (R. Vol. I, 79).

## XII.

The Court erred in holding in reference to said Section 2 (B) in its finding of fact of January 25, 1940, that:

"The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher complainants) have the right to and do give away and distribute free of charge, professional copies of



the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value" (R. Vol. I, 138),

because the statute in no way prohibits the giving away of copyrighted musical compositions with or without public performance rights; that such arrangement, if indulged in, would be a simple matter of contract between the composer and his publisher and is extraneous to the issues involved in this case, and in no manner violative of the Copyright Act or the Nebraska Act.

### XIII.

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska Act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act (R. Vol. I, 132-141).

### XIV.

The Court erred in failing to correct its decree of January 25, 1940 (R. Vol. I, 139), for the additional reasons set forth in appellants' motion for rehearing (new trial) filed February 5, 1940 (R. Vol. I, 141-162), which reasons and grounds are made a part of this assignment of error as if copied verbatim herein.

Respectfully submitted,"

(Duly signed. Service acknowledged.)

## POINT NO. I.

While copyrighted vocal and instrumental musical compositions may grant individual monopolies, they cannot be unitedly exercised to restrain competition and to fix prices; and a suit to enjoin such combination to restrain commerce and trade in copyrighted musical compositions is not one arising under the Copyright Laws of the United States.

*Boston Stores v. American Graph Co.*, 246 U. S. 8, 38 S. Ct. 257.

*Ethyl Gas Corp. v. U. S.*, 309 U. S. 436, 60 S. Ct. 618.

*Fashion O. G. A. v. Fed. Trade Com.*, ..... U. S. ...., 61 S. Ct. 703, affirming 114 Fed. 2d 80.

*Mines v. Scribner*, 147 Fed. 927.

*Murphy v. Christian*, 38 App. Div. 426, 56 N. Y. S. 579.

*Standard Oil Co. v. U. S.*, 283 U. S. 163, 51 S. Ct. 421.

*Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20, 33 S. Ct. 9.

*State of Washington v. ASCAP*, 13 Fed. Supp. 141.

*Straus v. American Publishers Ass'n*, 231 U. S. 222, 34 S. Ct. 84.

*Straus v. Victor Talking Mach. Co.*, 243 U. S. 490, 37 S. Ct. 412.

U. S. C. A., Title 17, Sec. 1 (Mar. 4, 1909, C. 320, Sec. 1, 64, 35 Stat. 1075, 1088.) Copyrights.

## POINT NO. II.

There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing statutes which secure competition and preclude combinations which tend to defeat it; and the state is the sole judge, within reasonable limitations, of what laws shall be enacted for the protection and welfare of

its people and as to when and how the police power of the state shall be exercised.

*Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66.

*Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772.

*State v. Drayton*, 82 Neb. 254, 117 N. W. 768.

*National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 S. Ct. 379.

*Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505.

*Paramount Famous Lasky v. U. S.*, 282 U. S. 30, 51 S. Ct. 42.

*Selover v. Walsh*, 226 U. S. 112, 33 S. Ct. 69.

*Shallenberger v. First National Bank*, 219 U. S. 114, 31 S. Ct. 189.

*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 S. Ct. 220.

### POINT NO. III.

The state may pass such reasonable regulations in reference to the sale and use of copyrighted material by the individual owner and his publisher within the State of Nebraska as its legislature may deem proper, when the enactment is not prohibited by the Copyright Act nor in derogation of it.

*Allen v. Riley*, 203 U. S. 347, 27 S. Ct. 95.

*Straus v. Am. Pub. Ass'n.*, 231 U. S. 222, 34 Sup. Ct. 84.

*John Woods & Sons v. Frank Carl*, 203 U. S. 358, 27 S. Ct. 99.

*Paramount v. Langer*, 23 Fed. Supp. 890 (Decision under Sec. 266 of the Judicial Code).

*Patterson v. Kentucky*, 97 U. S. 501, VII Otto 501.

### POINT NO. IV.

A state statute prohibiting monopolies in copyrighted vocal and instrumental musical compositions does not

militate against the commerce clause of the Federal Constitution when the acts of the unlawfully combining conspirators are so carried on as to be intrastate transactions.

*Arkansas-Louisiana Gas Co. v. Dept. of P. U.*,  
304 U. S. 61, 58 S. Ct. 770.

*Eichholz v. Public Service Com. of Mo.*, 306 U.  
S. 268, 59 S. Ct. 532.

*Hartford v. Illinois*, 298 U. S. 155, 56 S. Ct. 685.

*Interstate Circuit v. Paramount Pictures*, 306 U.  
S. 208, 59 S. Ct. 467.

*Milk C. B. of Pa. v. Eisenberg*, 306 U. S. 346,  
59 S. Ct. 528.

*Paramount v. Langer*, 23 Fed. Supp. 890 (De-  
cision under Sec. 266 of the Judicial Code).

#### POINT NO. V.

The penalties of an anti-monopoly statute may not be considered so drastic as to be nonenforceable and to deprive those affected by it of the due process and equal protection clauses of the State and Federal Constitutions, when the act itself gives full and complete protection in the courts, and when the penalties for violation are from \$1.00 to \$5,000, and when the criminal provisions provided are misdemeanors with penalties not to exceed one year in prison, and when such fine or imprisonment may be imposed only after a full and complete hearing on the merits in the courts of the state, and when jury trial is guaranteed by the act and the Constitution of the state. The Court may consider similar penalties in other anti-monopoly statutes in Nebraska and in the nation as an aid in sustaining the act.

*Collins v. Johnston*, 237 U. S. 502, 35 S. Ct. 649.

*Marsh-Burke v. Yost*, 98 Neb. 523, 153 N. W. 573.

*Noble v. Carlton*, 36 Fed. (2d) 967.

*People v. Magoni*, 73 Cal. App. 78, 238 Pac. 112.

*People v. Cruz*, 113 Cal. App. 513, 298 Pac. 556.



*Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N. E. (2d) 657.

Penalty Provisions of: Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; (Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry.)

Penalty Provisions of: Sherman Anti-Trust Act and Clayton Act, Title 15, Sec. 1-7 and Sec. 12-27, U. S. C. A.

#### POINT NO. VI.

Where there is a conflict in the considered opinion of the Court and the findings of fact, conclusions of law, and decree subsequently entered, the opinion will be considered supererogatory; and the findings of fact, conclusions of law, and decree only will be considered on appeal.

*Basevi v. Edward O'Toole Co.*, 26 Fed. Supp. 41.

*Interstate Circuit v. U. S.*, 304 U. S. 55, 58 S. Ct. 768.

*Pennac Corp. v. Esterbrook Steel Pen Co.*, 27 Fed. Supp. 86.

#### POINT NO. VII.

If a three-judge federal court, sitting under the provisions of Section 286 of the Judicial Code, in its findings of fact, conclusions of law, and decree makes no finding, conclusion, or decree that a state statute permanently enjoined is violative of a Federal statute or the Federal or State Constitution, the Supreme Court of the United States in reviewing the case is justified in reversing the cause, dissolving the permanent injunction, and ordering

the case dismissed because the basis for the three-judge federal court's jurisdiction is the repugnancy to a Federal statute or some provision of the Constitution.

*Buck v. Gallagher*, 36 Fed. Supp. 405.

*Buck v. Gibbs*, 34 Fed. Supp. 510.

*Buck v. Swanson*, 33 Fed. Supp. 377.

*Interstate Circuit v. U. S.*, 304 U. S. 55, 58 S. Ct. 768.

Rule 52 (a) of Rules of Civil Procedure.

Section 266, Judicial Code; Title 28, U. S. C. A., Section 380.

NOTE: [In the case at bar, there *were* findings of fact, conclusions of law, and decree of January 25, 1940 (R. Vol. I, 132-9); but nowhere therein was it stated that the Nebraska Legislative Act in question was repugnant to any part of the Federal Constitution, or the State Constitution, or the Copyright Act.

In a previous opinion dated December 28, 1939 (33 Fed. Supp. 377), there was a finding or conclusion that only one part or provision of the act was repugnant to the National Copyright Act, to wit: Section 2 (B) of the Act in question (R. Vol. I, 79).]

#### POINT NO. VIII.

If on appeal to the United States Supreme Court, in an action brought under Section 266 of the Judicial Code, wherein the lower court granted a permanent injunction, the appellate court should consider an opinion rendered by the lower court previous to the findings of fact, conclusions of law and decree, holding that one subsection of the Act in question was inseparable from the balance of the Act, and was the inducing cause for its

passage, and for that reason declared the entire Act non-enforceable, then the appellate court should re-examine such question and sustain the enforceability of all the balance of the Act, when it is clear that after striking out the unconstitutional part of the statute, the residue is intelligible, complete, and capable of execution. Especially is this true when the state court has never passed upon the question.

*Carter v. Carter Coal*, 298 U. S. 238, 56 S. Ct. 855.

*Dorchy v. Kansas* 264 U. S. 286, 44 S. Ct. 323.

*In re Lew Agnew*, 89 Neb. 306, 131 N. W. 817.

*John Reddell v. Moores*, 63 Neb. 219 at 225, 88 N. W. 243.

*Logan Co. v. Carnahan*, 66 Neb. 685 at 694 and 708, 92 N. W. 984.

*Merrill v. State*, 65 Neb. 509 at 517 and 518, 91 N. W. 418.

*Peterson v. Beale*, 121 Neb. 348 at 353, 237 N. W. 146.

*Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857.

*State v. Price*, 129 Neb. 433, 261 N. W. 894.

*State v. Ure*, 91 Neb. 31 at 43, 135 N. W. 224.

*State v. Stuht*, 52 Neb. 209, 71 N. W. 941.

*Sunderland v. Mo. P. Ry. Co.*, 101 Neb. 119, 162 N. W. 494. o

*Union v. Sprague*, 69 Neb. 48, 95 N. W. 46.

*Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115.

#### POINT NO. IX.

The issue of whether or not a particular subsection of an act was the inducing cause for its passage is a matter of legislative intent which must be pleaded in order to raise the issue; and if not so raised, the trial court errs in any findings or ruling on the subject. It is proper for the parties adversely affected by such er-

roneous ruling to call the trial court's attention thereto in a motion for rehearing and a showing by affidavits of a majority of all the legislators who voted for the act that said subsection was not the inducing cause for its passage nor for their affirmative votes.

*Bresee v. Preston*, 91 Neb. 174, 135 N. W. 544.

*Glenn v. Field Packing Co.*, 290 U. S. 177, 54 S. Ct. 138.

*Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727.

*Wald T. & S. Co. v. Smith*, 290 U. S. 602, 54 S. Ct. 227 (on rehearing).

*York v. Chicago, B. & Q.*, 56 Neb. 572, 76 N. W. 1065.

59 C. J., Section 740, Page 1200 (Note 22a).

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**ARGUMENT****Argument to Sustain Law Point No. I.**

The appellee society, ASCAP, and its individual members, some of whom are appellees, are all a part of the unlawful combination. The fact that these appellees are dealing in an incorporeal right, or a franchise, *may* have been in the past a defense against anti-monopoly statutes that defined commodities, products, or material as its subject matter, but the State of Nebraska under its police power has *now* enacted the statute in question. Section 1 thereof (pages 135-150 hereof) is directed specifically against a combination organized for the purpose of fixing fees and licenses in public performance rights for profit of copyrights on music within the State of Nebraska; the combination has for one of its purposes the prevention of free competition among others, or with different and competing copyright owners.

ASCAP admittedly deals only in "small" public performance rights. That means there is eliminated from consideration in this case, because not covered by the act, the dramatico-musical rights or what are known as the "grand rights," the moving picture rights, the recording rights, and all other similar rights. There has been assigned to ASCAP, by these individual appellees and others, only the sole right to fix prices and collect fees each and every time a piece of music is rendered publicly for profit in a hotel, radio studio, or similar place. It makes no difference whether there is an admission charged at the door or whether there is any direct profit or not. ASCAP collects for these rights wherever and whenever music is played and sung, even though that music

has been orchestrated and purchased obviously for the sole purpose of playing it publicly for profit.

These public performance rights are fixed and collected by ASCAP and distributed as dividends among its members.

These and other facts in connection with the operations of ASCAP have been found by the lower Court and clearly set forth (pages 58-60 hereof). Other similar facts appear undisputed (pages 63-65 hereof).

The subject matter of the state act is coupled with a public interest as shown in the opinion of the Court (page 9 hereof). It is apparent that without the right to use some of this vast amount of music controlled by ASCAP the financial investments of persons, firms, or corporations that must have music played and sung upon their premises in Nebraska, are seriously jeopardized (page 10 hereof). These facts have all been established by the opinions, findings, and decree of the Court and stand unappealed and final for the purpose of this case.

*From a legal standpoint, this question arises: Does the National Copyright Act, under which these public performance rights arise, prevent the State of Nebraska from exercising its police power in reference to monopoly in public rendition rights of music, granted to the individual with the power of assignment?*

The following cases clearly hold that the police power of a state is not obliterated by the National Copyright Act and especially in the matters covered by Section I of the State Statute, and all the enforcement pro-

visions thereof which are Sections 7 A, B, Sec. 8, 9 A, B, C, D, 10 A, B, 11 A, B, as well as Sections 12 and 13 (pages 135-150 hereof).

In the case of *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. 257 Syllabi Nos. 2 and 3 the court states:

2. "Contracts between a manufacturer of graphophones, etc., as assignee of patents, or its agents, and all dealers permitted to sell them throughout the country, which fixed the prices at which the articles might be resold, and covenanting that underselling is an infringement of the patents, though speaking of the contract as a license, is not justified under the guise of the monopoly granted by the patent law."

3. "Such contract is invalid under the law."

In *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, 60 S. Ct. 618, at page 461 in 309 U. S., the Court stated:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. \* \* \* Since the court rightly concluded that these reasons were without substantial weight, it properly suppressed the means by which the unlawful restraint was achieved."

In *Fashion Originators' Guild of America, Inc., et al. v. Federal Trade Commission*, .... U. S. ...., 61 S. Ct. 703, affirming 114 Fed. 2nd 80, the Court held:

"But petitioners further argue that their boycott and restraint of interstate trade is not within the

ban of the policies of the Sherman and Clayton Acts because 'the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four.

"Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."

In *Mines v. Scribner*, 147 Fed. 927 (the defense was the Copyright Act) it is stated:

"The copyright law cannot help the defendants, because, in the first place, the restraint is not confined to copyrighted books, and, if it were, it cannot be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners."

Syllabus No. 2 of this case states:

"Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A blacklist was kept containing the names of such persons, and no one on the blacklist could buy any books of anybody in the scheme. *Held*, that



such scheme constituted a conspiracy in restraint of interstate trade or commerce."

In *Murphy v. Christian P. & P. Co.*, 38 App. Div. 426, 56 N. Y. S. 597 (the defense was the Copyright Act), the Court in the opinion stated:

"We suppose that the author of a new geometry may fix the price at which he will sell his work at any sum, or arrange with others for its publication and sale at the stipulated price. But if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject except for a stipulated price, the contract would be in restraint of trade and void. The difference of principle between the two cases is just this: Monopolies are not favored, and agreements to create the same, except where authorized by law, are void. No law authorizes a monopoly of all publications on the subject of geometry; the law does, however, authorize and grant to the author a monopoly in any particular work which he may publish on that subject."

In *Standard Oil Co. v. United States*, 283 U. S. 163, 51 S. Ct. 521, Syllabi 4 and 9 the Court states:

4. "Limited monopolies granted to patent owners do not exempt them from prohibitions of anti-trust legislation (Sherman Anti-Trust Act Secs. 1, 2 [15 U. S. C. A. Secs. 1, 2])."

9. "If combining patent owners effectively dominate industry, power to fix royalties for licenses is tantamount to power to fix prices (Sherman Anti-Trust Act Secs. 1, 2 [15, U. S. C. A. Secs. 1, 2])."

In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 33 S. Ct. 9, Syllabus 1 states:

"Agreements embracing 85 per cent of the manufacturers of, and 90 per cent of the jobbers in, enameled ironware \* \* \* cannot escape condemnation under the Sherman anti-trust act of July 2, 1890 (26

Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3,200), because the agreements take the form of licenses from the owner of a patent for a device used in the enameling process."

In *State of Washington v. A. S. C. A. P.*, 13 Fed. Supp. 141 (the defense was the Copyright Act), it is stated:

"While the compositions owned and controlled by the defendant society may be copyrighted, a suit to enjoin a conspiracy to restrain commerce and trade in such compositions is not one arising under the copyright laws of the United States."

In the case of *Straus v. American Publishers' Association*, 231 U. S. 222, 34 S. Ct. 84 (the defense was the Copyright Act), it is stated at page 88:

"We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books."

Syllabus 2 of this case states:

"The copyright monopoly conferred by the Federal laws does not protect, as against condemnation under the Sherman anti-trust act of July 2, 1890, agreements between associations embracing probably 75 per cent of the book publishers and a majority of the booksellers in the United States, which operate to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and result in almost completely destroying competition in such books at retail."

In *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 S. Ct. 412, the opinion states:

"Convinced, as we are, that the purpose and effect of this 'License Notice' of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the prices of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of *Adams v. Burke*, 17 Wall. 453, 456, 21 L. Ed. 700, 703; and of *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; that it is, therefore, invalid, and that the district court properly held that the bill must fail for want of equity.

In the last case, note that Mr. Justice Clark in announcing the opinion of the Court stated:

" \* \* \* the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid."

Thousands of infringement suits throughout the United States have been instituted by ASCAP to whip music users into line and to sign their contracts. In Nebraska, there were about 100 such suits in recent years (page 64 hereof). In Nebraska, there are 391 licenses, and in the United States some 33,000 licenses for these public performance rights upon which the society collects some \$6,000,000 per year. About \$70,000 is collected from Nebraska annually (page 10 this brief).

Appellants contend that in the light of the facts established below, and admitted by the record, when applied to the decisions above quoted the Court is confronted squarely with the proposition that all the sections of the act in question which deal with the unlawful combination are a proper exercise of the police power. These sections of the act are Section 1 concerning monopoly, Section 2 (C) which is a reiteration of the restrictions against reselling the same as in the National Copyright Act, Section 3 declared nonenforceable these licenses made, not with the individual copyright owners, but with the unlawful, monopolistic combination. Sections 4 (A) and (B), 5 (A) and (B), and 6 in no way are against the operations of any person, firm, or corporation owning public performance rights excepting the unlawful combination as defined in Section 1 of the act.

These last mentioned sections were obviously enacted to protect such users as radio stations, theaters, and other persons, firms, and corporations within the State of Nebraska from being victimized by the unlawful combination should it attempt to reach into the State of Nebraska through agencies, and try in that way to escape control by the State of Nebraska. Yet, Section 6 (page 143 hereof) specifically holds and recognizes that in the event of infringement of copyright by local radio stations, theatres, and other users of music in Nebraska, they could not be exempted from the provisions of the National Copyright Act in reference to infringement but would be required to rely upon the theory of subrogation to recover damages that such users may have suffered by virtue of infringement brought about by the unlawful combination in dealing with affiliates of the Nebraska users.



Sections 7 (A) and (B) prevent the unlawful combination from dealing through persons, firms, and corporations acting as agents for it within the state. Section 8 has to do with penalties. Later we will comment upon the reasonableness of the penalties and the enforcement features of the act.

For the purpose of further explanation of point No. 1, and the application of the decisions hereinabove set forth to sustain the point, a careful reading of said Sections 1, 2 (C), 3, 4 (A) and (B), 5 (A) and (B), 6, and 7 (A) and (B), (pp. 135-150 hereof) will be found helpful to the court because it is very apparent that those sections deal with "unlawful monopoly," and "unlawful" combinations. Those sections, together with the enforcement provisions hereinafter set forth, constitute an act within itself and within the law. Sections 2 (A), 2 (B) and 2 (D) deal with individuals in reference to their public performance rights. The act stands firm either with or without the parts of Section 2 that deal with the individual.

#### **Argument to Sustain Law Point No. II.**

The state, within certain well-defined, reasonable limitations, may enact statutes which secure competition and preclude combination which tends to defeat it.

If, as in Point I determined, the State may enact legislation against the intangible franchise of public performance rights in vocal and instrumental musical compositions that are copyrighted, then great weight should be given to the general proposition of law that the Nebraska act above cited is not an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power.

The following cases show the lengths to which the high courts of the nation and state have gone to announce unequivocally the right of a state legislature to be the deciding factor in the propriety of its legislative programs. Appellants do not overlook the National Copyright Act in any of its features when applying the law set forth in the following cases:

In the case of *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66, Justice Holmes in the opinion stated:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. \* \* \* If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts."

In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, Paragraph 8 of the Syllabus states:

"In exercise of its police power, state may forbid as inimical to public welfare the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit."

The State of Nebraska has very distinctly defined what its Legislature may do under the police power in

reference to monopoly—and which applies to existing and cumulative laws in addition to the act in question. *State v. Drayton*, 82 Neb. 254, 117 N. W. 768, holds as follows:

“Then unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusions that it is not subject to attack upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business, nor prevent the sale of any commodity at any price which the owner may fix or demand.”

In *National Cotton Oil Company v. Texas*, 197 U. S. 115, 25 S. Ct. 379 Syllabus 1 states:

1. “The property of a foreign corporation engaged in manufacturing products of cotton seed is not taken without due process of law by the Texas anti-trust laws, under which its license to do business in that state is forfeited for violating those laws by entering into an agreement to regulate or fix the price of cotton seed.”

In *Nebbia v. People of State of New York*, 291 U. S. 502, 54 S. Ct. 505, Syllabi 9 and 11 state:

9. “On proper occasion and by appropriate measures, state may regulate a business in any of its aspects, including selling prices of products or commodities.”

11. "Courts are unauthorized to deal with wisdom of legislative policy, or adequacy or practicability of enactments, and law seeking to curb unrestrained and harmful competition may not be annulled unless arbitrary or discriminatory."

The Court in the opinion at Page 537 of 291 U. S. states:

"And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 51 S. Ct. 42, it is stated at Page 43 of 282 U. S.:

"It may be that arbitration is well adapted to the needs of the motion picture industry; but, when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal.

"In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the stat-



ute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties and be of some good results.' "

In *Selover v. Walsh*, 226 U. S. 112, 33 S. Ct. 69, the Court in the opinion stated:

"The dilemma was not presented to the supreme court of the state for resolution, as plaintiff in error had made no attempt to comply with the statute in any way. As that court held the statute applicable to contracts such as that under review, it will, no doubt, in a proper case, so construe the statute as to make it effective. We are not called upon to anticipate its ruling \* \* \* and we may say further, it is well settled that a corporation cannot claim the protection of the clause of the 14th Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state."

In *Shallenberger v. First National Bank*, 219 U. S. 114, 31 S. Ct. 189, Justice Holmes adapted his opinion in *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 186, wherein the Court held:

"If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

Syllabus 3 stated:

3. "The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

In *Waters-Pierce Oil Company v. Texas*, 212 U. S. 86, 29 S. Ct. 220, Syllabus 4 states:

"State legislatures, in the exercise of their power to deal with monopolies and combinations in restraint of trade, may provide their own methods of procedure and determine the methods and means by which their legislation may be made effective, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

When the appellees in this case restrained and enjoined the appellants from enforcing the state law, the lower Court most certainly erred when it failed to recognize the right of the state to prohibit the activities indulged in by the appellees in handling public performance rights within the State of Nebraska. Law Point No. II therefore goes to the basic fact of whether or not these activities, coercions, method of collection, combination, infringement suits, basis for collection of the so-called royalties, the basis for its distribution, and all other of these facts clearly brought out in the opinion, as well as in the findings of fact and conclusions of law, do not in themselves constitute violations of law, whether the appellees were dealing in public performance rights that originated under the Copyright Act or not. Appellants claim that the state legislature is within its rights in curtailing the activities of the appellees within the fair and reasonable limitations set forth in all those parts of the statute in question which relate to the unlawful combination, i. e., the entire act excepting Sections 2 (A), 2 (B), and 2 (D). We eliminate that section and its subsection from consideration at this point because they deal especially with the individual copyright owner while the balance of the act, which are its main and principal portions, deal with

an unlawful combination and prohibitions against its activity.

The activities of the ASCAP organization and the appellees, while a part of that unlawful conspiracy, show practices within the State of Nebraska that are within the power of the legislature of the State of Nebraska to prohibit even though originating with or growing out of the individual copyrights.

#### **Argument to Sustain Point of Law No. III.**

Law Point No. III sets forth, as a proposition of law, that the state may pass reasonable regulation in reference to the sale and the use of public performance rights by the individual owner and his publisher within the State of Nebraska so long as the provision is not prohibited by the Copyright Act nor in derogation of it. This brings up directly the question of the purport of Sections 2 (A), 2 (B), and 2 (D) of the act in question (pages 138-140 hereof). Those sections deal with the individual copyright owner, while the entire balance of the act, as repeatedly stated, deals with an unlawful combination in its activities and the prohibitions of its price-fixing, monopolistic practices within the state.

This Law Point No. III in reference to the state's right to legislate concerning the individual's right under the National Copyright Act, might readily be answered by stating that the state has no such right, if it were not for the fact the federal courts hold that the state, within certain limitations, may prescribe reasonable and fair regulations for carrying on rights within a state granted under either the patent or copyright laws of the United States Government. The following cases deal

with state legislation affecting both patents and copyrights.

There is an erroneous statement in the opinion of the court of December 28, 1939 (page 25 hereof), which is as follows:

"The rights of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

In what manner and where does the statute interfere with a copyright owner so doing? Admittedly the right of public performance for profit covered by Section 1 of the National Copyright Act (17 U. S. C. A. Sec. 1) in no way directly or indirectly curtails, hampers, or regulates motion picture rights, stage rights, recording rights, or radio reproduction rights. There is nothing in the state act which prevents any copyright owner from doing what he pleases in connection with any or all of those rights. Admittedly, he may sell them separately or together or not sell them at all. The appellee Buck in his testimony (R. Vol. I, 184), after stating that ASCAP had no interest whatever in the publication of musical compositions or sheet music, and that it owned no copyrights, and never did in its history, further stated as follows:

"Q. In what is the Society interested?



A. The author, composer and publisher vests in the Society the so-called 'small performing right'—the right to publicly perform for profit.

Q. Is that the only right in which the Society is interested?

A. That is the only right they have."

The deposition of Mrs. Ella Herbert Bartlett, Victor Herbert's daughter, clearly and unmistakably corroborates the repeatedly established facts in the case that there are no rights except the "small" public performance rights involved herein for the reason that ASCAP deals only in the said "small" public performance rights on vocal and instrumental musical compositions that are played or sung in public, such as in the hotels and in the studios of the radio stations, and at the parks, dance halls, pavilions, and other places of amusement. The state act positively has no concern with stage rights, moving picture rights, or the many other rights that are given by the Copyright Act—only the small public performances for profit.

So, the lower Court herein, in setting forth these various other rights and attempting to apply the statute to these rights, as a basis for its conflict with the National Copyright Act was clearly in error.

However, it is proper to inquire as to whether or not the requirement of Section 2 (A) is an interference with the individual's rights under the National Copyright Act in connection with the small public performance rights. All the rights of the appellee ASCAP and the individual appellees, as a part of the combination, flow from one clause in Section 1 of the National Copyright Act [Title 17, U. S. C. A., Sec. 1 (e)]:

"Any person entitled thereto upon complying with the provisions of this title shall have the exclusive right \* \* \* (a) \* \* \* (b) \* \* \* (c) \* \* \* (d) \* \* \* (e) to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

That is the sum total of the language of the National Copyright Act in connection with all the public performance rights involved in this action. Nowhere in the act is it written that the copyright owner may have the right to collect public performance rights, after he has sold and parted with his music and was paid for orchestrations thereof obviously for public performance purposes. However, the Copyright Act gives to the individual copyright owner and his heirs and assigns the right to collect public performance rights. The National Act does not grant to the individual or his heirs or assigns the right to collect money each and every time that a piece of music is played in public for profit. This right has been built up by consent decrees and by case law that has been creeping into the decisions of our courts during the past twenty-five years of ASCAP's growing monopoly. Now it is able to cite lists of dozens of cases in infringement suits against music users. Thus ASCAP has been able to establish the right to collect for public performance rights against most anyone at most any time and any place and under any conditions and under all circumstances if a score of music is played publicly and some indirect benefit might be inferred to flow to the establishment where it was played or sung.

Even though that music has been bought and paid for and the orchestrations paid for additionally, still,

each time that the music is played by the musicians, ASCAP continues to collect on and on and on. Naturally, under these conditions, confusion has arisen; and in the State of Nebraska, Section 2 (A) was passed, not as an inducing cause for the main anti-monopoly features provided in Section 1 of the act, but as a safeguard for the individual composer. Section 2 (A) in no way sought to curtail or limit the amount of the charge for the public performance rights, but the act does say that each author, composer, and publisher shall act independently of substantial numbers of other authors, composers and publishers and independently of the combination declared unlawful by Section 1—

“in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical compositions, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes.”

Nowhere in the case law built up by ASCAP and under no federal statute, copyright or otherwise, is there an utterance to be found that the plan as outlined in Section 2 (A) is in derogation of the rights of a copyright owner granted him under the National Copyright Act or the many decisions construing the same.



**How would clause [2 (A)] operate from a practical standpoint?**

In the deposition of Mrs. Ella Herbert Bartlett (R. Vol. II, 697-705), she testified that in 1938 she received \$6,000 at 3c per copy for sheet music sold during the year. ASCAP had nothing to do with that. That meant 200,000 copies of sheet music sold. She testified that she received about \$10,000 from ASCAP each year (R. Vol. II, 688-691) for the small public performance rights, and \$50,000 each for several stage and moving picture rights arranged between herself, her publisher and the purchaser-user. If in the sale of 200,000 copies of music one-fourth thereof, or 50,000 copies were orchestrated or otherwise arranged for public performance, and if at the time that music were sold across the counter in the music store for that purpose, and if the small sum of fifty cents per copy for those pieces that were sold for public performance had been charged and collected when and as the three-cent royalty for the sheet music was collected, she would have received \$25,000 for the public performance rights for each year instead of \$10,000 received from ASCAP. This then would be equitable to the composer because the users who wished to buy public performance rights could go to the music stores or the catalogues of the various publishing houses and select in open competition what was desired, and bargain for it exactly as one pays the royalty on sheet music, or the royalty on moving picture rights, or on phonograph records, or stage rights, and on all the other rights granted under the National Copyright Law. None of these other rights are under monopolistic control. Each publishing house with its composers is in competition with others in reference



to all these rights excepting the "small" public performance rights. In reference to those, 85% to 90% of all the public performance rights on usable popular music is under the control and domination of the appellee Society. Thus, it would seem that Section 2 (A) may not work an injustice but would be a benefit to all but ASCAP's high-salaried officers. Opportunity should be given the State of Nebraska to exercise its police power in this manner. It is apparent that the provisions of Section 2 (A) of the act in question is not in derogation of the National Copyright Act. Congress has not legislated in that field.

In reference to Section 2 (B): that is a penalty clause and merely provides that if the composer refuses to comply with Section 2 (A) and charge and collect additionally for his public performance rights if he wishes to sell such rights when the music is sold; then naturally, if Section 2 (A) is to have any force and effect, Section 2 (B) would necessarily follow as a penalty proviso. Otherwise there would be no object in the passage of Section 2 (A).

Section 2 (D) is a requirement for recording copyrights in the state. It may be burdensome and it may not be; it would all depend upon the conditions that arose at the time. It has not been tested in the state Court under practical operation any more than any other parts of the act. Appellants anticipate no serious consequences to appellees if the cause is reversed and dismissed. The music publishing houses that "are" virtually ASCAP will no doubt comply with the law readily.

However, the fact remains that Sections 2 (A), 2 (B) and 2 (D) all deal with the individual. Those three

sections are entirely independent and separable from the balance of the act and may stand or fall exactly as if they were written into an entirely different, separate, and distinct bill. That is apparent from the act itself (pages 135-150 hereof).

However, appellants maintain that Section 2 (A) is a legitimate and fair and reasonable exercise of the police power of the state; that it does not deprive the individual copyright owner of any privilege that is given him under the National Copyright Act.

We quote from the following cases that illustrate the holdings of the court in reference to state laws passed in reference to patents and copyrights and which have been construed in support of appellants' contention on this Law Point No. III.

In *Allen v. Riley*, 203 U. S. 347, 27 S. Ct. 95 (1906), at page 96 it is stated:

"It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provisions quoted above, and that any regulations whatever, by any state authority, in regard to such assignment or sale, and making provision in respect to them, are illegal."

In the opinion the Court stated:

"The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the states to legislate on the subject themselves in a manner neither inconsistent with, nor opposed to, the Federal statute. We think the judgment is right, and it is affirmed. \* \* \*"

"We think the state has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to."

In *Straus v. American Publishers' Association*, 231 U. S. 222, 34 S. Ct. 84, the Court in the opinion stated:

"We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books."

In *John Woods & Sons v. Frank Carl*, 203 U. S. 358, 27 S. Ct. 99, Syllabus No. 1 states:

"The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's (Ark.) Dig. Sec. 513, does not violate U. S. Const. art 1, Sec. 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. Sec. 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office."

In *Paramount Pictures v. Langer*, 23 Fed. Supp. 890 (8th Cir.). (the defense was the Copyright Act), the Court in the opinion while referring to copyright as a defense to state anti-monopoly laws said:



"The legislature is primarily the judge of the necessity of the law. Every possible presumption is in favor of its validity, and, though the Court may regard it as unwise, it may not be annulled unless palpably in excess of legislative power."

In *Patterson v. Kentucky*, 97 U. S. 501, at Page 506 (Otto VII), it is stated:

"If the State should pass a law for the purpose of destroying a right created by the Constitution, this court will do its duty; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal government."

Further in the opinion, at Page 509, it is stated:

"Without further elaboration, we deem it only necessary to say that the Kentucky statute does not, in our judgment, contravene the provisions of the Federal Constitution, or of any statute passed in pursuance thereof. Its enforcement causes no necessary conflict with national authority, and interferes with no right secured by Federal legislation, to the patentee or his assigns."

Furthermore, there should be taken into consideration at this point the fact that none of the appellees in this action are before this Court excepting as a part of an unlawful conspiracy and each is acting in violation of the Nebraska statute in furtherance of that conspiracy. It would seem, therefore, that appellees have no standing in court to make complaint in connection with Section 2 (A), 2 (B) and 2 (D) because none of the individual appellees will act independently of the combination. They are then not affected by these provisions.



However, the act in question will stand with Sections 2 (A), 2 (B) and 2 (D) stricken. The balance is fully enforceable. The entire main features of the act are completely independent of Sections 2 (A), 2 (B) and 2 (D). These facts become readily apparent by analyzing the act in question (pages 135 to 150 hereof) with the views herein expressed in mind.

#### **Argument to Sustain Point of Law No. IV.**

There is no reference in the lower Court's opinion of December 28, 1939, nor in its later findings of fact or conclusions of law which directly states that the act in question is in violation of the commerce clause of the Federal Constitution. The bill of complaint of the appellees raised the point. The findings of fact, conclusions of law, and decree of January 25, 1940 (pages 12-21 hereof) declare the whole act void and nonenforceable, but not for any violation of the commerce clause nor as a matter of fact any other announced reason.

So careful were the appellants<sup>ees</sup> in their dealings in public performance rights to avoid violation of the commerce clause that they made no charge whatever for the use of public performance rights against the chains for music which emanated from outside the state of Nebraska for the purpose of rebroadcasting within Nebraska. Nor did ASCAP make any charge against the moving picture producers who used music in a sound producing moving picture [R. Vol. I, 263; 94; Vol. II, 873 (2)]. Instead the record is clear that ASCAP in Nebraska has made and is making its charges for public performance rights against the places in Nebraska from which the music is

played, such as a hotel, a movie theatre, a ballroom or a local radio station (R. Vol. I, 212; 89; 94; 96).

Appellants refer briefly to six cases which they believe to be in point on the question of interstate commerce. *Paramount Pictures v. Langer*, following, seems most directly in point because it deals with copyrighted films used in moving pictures that moved from California into the Eighth Circuit at North Dakota and became the subject of anti-monopoly legislation.

No evidence is necessary to show how music is rendered publicly for profit. The hotel, the radio station, the amusement park, the ballroom employ musicians. The users know little or nothing specifically about the style or kind of music, nor the particular pieces that are to be played. Nor do the music users know whether the pieces of music are copyrighted or not or who owns the copyright. Nevertheless, under the infringement division of the Copyright Law, the owner of the premises or the business operator or both is liable for infringement under many ASCAP decisions. However, the orchestras or singers go upon the premises to play or sing; they open up their music rolls and perform—purely an intrastate transaction. The musical instrument is inert by itself; the musical composition is inert by itself. It takes a human mind, functioning solely within the state to create by action, in a purely intrastate transaction, musical sounds which he produces in two ways, either through an instrument or through the human voice, or both. In either event, the rendition is an intrastate transaction; it in noway affects or influences or impedes in the slightest

degree, directly or indirectly, commerce between the states, nor anything that flows in commerce between the states.

Music played in the studio of a radio broadcasting station might be heard over state lines; but such would not be an interference with commerce. There is no money transaction involved in that part of the performance that goes over the lines through the ether. In the testimony of Gillin (R. Vol. I, 399-406), he explains as a competent radio station manager that even the broadcasts that emanate from New York come into Omaha by wire. What comes over that wire is just as inert as a musical instrument on the shelf. Until the broadcasting apparatus and machinery and equipment within the local broadcasting station within the State of Nebraska are put into operation, those sounds over the wire are not available to the people of the State of Nebraska in the radios in their homes and places of business throughout the state.

There are 284,000 radio receiving sets in the State of Nebraska and 10 stations, 3 of which only have partial network affiliations (page 10 hereof).

It is apparent from a reading of the act in question that there is no part of it, directly or indirectly, which could logically be construed as affecting the commerce clause of the Federal Constitution (pages 135-150 hereof).

We cite the following cases which should aid the Court materially in the solution urged by the appellants on Law Point No. IV: )

In support of Law Point No. IV the case of *Arkansas-Louisiana Gas Co. v. Dept. of P. U.*, 304 U. S. 61, 58 S. Ct. 770, Paragraph One of the Syllabus states:

"An order of the Arkansas Department of Public Utilities, proceeding under a state statute, requiring public utilities to file schedules of rates and charges, was not an infringement of any right or privilege guaranteed by the Federal Constitution to a corporation purchasing and producing natural gas in neighboring states and thereafter transporting and delivering it through pipe lines to selected industries and public utility distributing corporations within the state, and to its own distributing department through which it acted as a public utility, irrespective of whether certain of its activities within the state were parts of interstate commerce."

In *Eichholz v. Public Service Com. of Mo.*, 306 U. S. 268, 59 S. Ct. 532, the Court in the opinion stated:

"That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See *Lone Star Gas Company v. Texas*, 304 U. S. 224, 236, 58 S. Ct. 883, 82 L. Ed. 1304. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In *Hartford Accident Indemnity Company v. Illinois*, 298 U. S. 155, 56 S. Ct. 685, the Court in the opinion stated at Page 157 of 298 U. S.:

"The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within



the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by article 1, Sec. 8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective."

In *Interstate Circuit v. Paramount Pictures*, 306 U. S. 208, 59 S. Ct. 467 (the defense was the Copyright Act) it is stated at Page 230 of 306 U. S.:

"A Contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. *Straus v. American Publishers' Association*, supra; *Paramount Famous Lasky Corp. v. United States*, supra; see *Standard Oil Co. v. United States*, 283 U. S. 163, 174, 51 S. Ct. 421, 425, 75 L. Ed. 926. In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 S. Ct. 9, 57 L. Ed. 107."

It is stated at Page 232:

"We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and

the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors."

*Milk C. B. of Pa. v. Eisenberg*, 306 U. S. 346, 59 S. Ct. 528, Syllabus 5 states:

"A state police statute does not run counter to the commerce clause merely because it incidentally or indirectly involves or burdens interstate commerce, even though such statute might be restricted in operation or rendered unenforceable if Congress should exercise its paramount power."

In the opinion the Court stated:

"But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century."

In *Paramount Pictures v. Langer*, 23 Fed. Supp. 890 (8th Cir) (the defense was the Copyright Act), Syllabus 1 states:

"The North Dakota statute prohibiting operation of motion picture theaters owned, controlled, man-

aged, or operated by producers or distributors of motion picture films did not improperly invade field exclusively reserved to Congress, on ground that it related to distribution of films in interstate commerce or rights of producers or distributors under the Copyright Law."

In the opinion the Court stated at page 895:

"It seems clear to us that any remote effect that the Act might have upon the distribution of films in interstate commerce or upon the rights of producers or distributors under the Copyright Law could not sustain a conclusion that the Legislature of North Dakota had invaded a field exclusively reserved to the Congress of the United States."

Note the very lucid and clear reasoning in *Paramount Pictures v. Langer*, supra. That case never reached the Supreme Court of the United States because the situation in North Dakota undoubtedly was remedied when that forceful opinion was rendered. The necessity for the act disappeared and it was repealed before the case reached final decision in the Supreme Court of the United States. Nevertheless, the reasoning of the opinion stands as an expression of the Western judicial mind in problems of the sort here under consideration.

#### **Argument to Sustain Point of Law No. V.**

This point has to do with the penalty provisions of the act in question. The point is brought out specifically because in the findings of the Court of January 25, 1940 [page 18, (p. 21) hereof], the severity of these penalties was given as the principal or only grounds for holding the act invalid.

Appellants have set forth under Law Point No. V references to the penalty provisions of many other Ne-

braska anti-monopoly statutes and the penalty provisions of the Sherman Anti-Trust Act and the supplements thereto. Without further comment or quotations therefrom, appellants advise that all the penalty provisions and the enforcement provisions of the act in question are identical with all the other anti-monopoly statutes, both state and federal, that have repeatedly been held to be proper by the various courts. Section 21 of the findings of fact of the Court below (R. Vol. I, 138; or page 18 hereof) specifically states:

“Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska.”

Obviously, the final permanent injunctive decree was based upon such finding. No other finding could sustain the decree. Therefore, it is the duty of the appellants to explain the law covered by Law Point No. V to prove that the enforcement and penalty provisions are proper and lawful.

Sections 8, 9, 10, and 11 of the act in question should here be read (pages 146-149 hereof).



*Noble v. Carlton*, 36 Fed. (2) 967, Syllabus 5 holds:

"Laws Fla. 1929, fixing penalty at fine of not more than \$5,000 or imprisonment in county jail for not more than twelve months for violation of regulations as to sale of milk and cream in such state, held not unconstitutional as imposing excessive penalty; it being within court's discretion to impose a fine as small as \$1."

The Court in its opinion at page 969 states:

"No such provision is contained in the Florida statute under consideration. The penalties therein provided make it within the discretion of the trial court to impose a fine as small as \$1. This certainly could not be considered excessive."

Penalty Provisions of Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; (Art. 1, Trusts, Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry).

Penalty Provisions of Sherman Anti-Trust Act (T. 15, U. S. C. A., Secs. 1, 3, 8).

*People v. Magoni*, 73 Cal. App. 78, 238 Pac. 112, at page 113 of 238 Pac.:

"In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A statute

does not violate the constitutional provision prohibiting the excessive fines or the imposition of cruel and unusual punishments, because it authorized a fine to be imposed for each sale of liquor without a license, for each act of extortion in charging excessive freight rates, for each animal one unlawfully may have in his possession, or for each day the statute is violated, or because it makes the deposit of each letter in a scheme to defraud a separate offense, even though the fine in the aggregate amounts to a large sum, since the punishment thus imposed is not the fault of the law but of the one who violates it. 16 C. J. 1358."

*Collins v. Johnston*, 237 U. S. 502, 35 S. Ct. 649 at page 653 of 35 S. Ct. states:

"The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states. (Citing cases.)

*Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N. E. (2d) 657, at page 660 of 11 N. E. (2d) states:

(2) "Defendant contends that the court erred in not quashing the 'contempt mittimus' because the punishment inflicted upon her is cruel and unusual, contrary to the Eighth Amendment of the United States Constitution, and to sections 11 and 12 of article 2 of the Constitution of this state, and that she has been deprived of her liberty without due process of law, contrary to the Fifth and Fourteenth Amendments to the United States Constitution. It has been repeatedly held that the first ten amendments to the Federal Constitution apply only to the national government and do not apply to the state government. (Citing cases.)

*People v. Cruz*, 113 Cal. App. 513, 298 Pac. 556, at page 557 of 298 Pac.:

"Appellant urges further that the Firearms Act violates the provisions of the Eighth Amendment to the federal Constitution and the provisions of section 6 of article 1 of the state Constitution because it authorized the infliction of a cruel and unusual punishment upon a person convicted of violating its terms. The Supreme Court of the United States has held that the Eighth Amendment to the federal Constitution is not a limitation on the powers of the states."

From the foregoing cases and all the Nebraska anti-monopoly statutes, the enforcement and penalty provisions of the act in question appear to be a proper exercise of the police power of the state.

When this Section 21 of the findings of fact of the lower Court is eliminated as a legal factor to sustain the decree, really nothing remains in the findings of fact to substantiate the conclusions of law and the final decree (pages 18-21 hereof).

The case should therefore be reversed—not sent back for new findings because there are findings—but reversed and dismissed because the findings fail to sustain the decree.

#### **Argument to Sustain Points of Law Nos. VI and VII.**

These law points deal with the reversible error resulting from the obvious difference in the *opinion* (pages 9 to 12 and 22-27 hereof) of December 28, 1939, the *findings of fact and conclusions of law* dated January 25, 1940 (pages 12-19 hereof).

On pages 28 to 56 of this brief, setting forth the entire motion for new trial, all the facts that were found in both the *opinion* and the *findings of fact*, were listed.

These facts are sufficient in themselves to establish the conclusion that the appellee ASCAP and the individual members thereof are each a part of the unlawful conspiracy operating in violation of the law. Therefore, all the appellees, as such conspirators, fall within the unlawful conspiracy provisions of the act in question. They have no standing in this Court as such conspirators (290 U. S. 240).

On pages 40 to 44 hereof, in the motion for new trial, the appellants have set forth some additional facts indexed to the printed record, which were undisputed and unchallenged or admitted. So much for the *facts*. The law applicable has been discussed under Points I, II and III.

However, the *opinion* of December 28, 1939, distinctly holds (pages 25-26 hereof) that Section 2 (B) of the act in question was in conflict with the National Copyright Law and was the inducing cause for the passage of the entire act and was inseparable from the balance, and for *that reason* the entire act was obliterated by the Court.

The Court in that opinion held:

"But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

"In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.



"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

Later, and on January 25, 1940, when the *findings of fact and conclusions of law* were so prepared, obviously by the attorneys for the appellees, but nevertheless signed by the three-judge federal court, and thus adopted as the Court's own, the "inducing cause" and "inseparability" features in reference to 2 (B) of the act in question were not even mentioned (pages 12-21 hereof).

Therefore, if the *opinion* is treated as supererogatory and as having no part in the case before this Court on appeal, as has been held in the cases hereinafter cited, then there remains only the points in the *findings of fact and conclusions of law* to sustain the permanent injunction. A careful reading of the findings of fact, conclusions of law, and decree on pages 12 to 21 hereof should convince the Court that the decree should have been for appellants and the injunction denied.

Thus, the presumption at once arises that the three-judge court knew its own mind—and purposely eliminated all the *legal conclusions* of the *opinion* and adopted new ones in its final *conclusions of law*. The facts as found in the *opinion* were reiterated in the findings of fact—but the law was changed by the Court itself. The change could not have been made inadvertently because that Court's attention was directed to it in the motion for new trial (pages 28 to 52 hereof) and by twenty-two affidavits of legislators that were filed to show the Court its

error from a factual standpoint on the question of "inducing cause" for the passage of the act (pages 53-56 hereof).

Furthermore, the Court was asked directly by appellants to change or amend its findings of fact (page 28, par. 3 hereof) in the said motion for new trial. The Court failed to do so, but instead finally adopted the findings of fact, conclusions of law, and decree of January 25, 1940 (pages 12 to 21 hereof), which appellants contend are now alone before this Court for consideration on the sufficiency thereof to sustain the decree.

Appellants cite the following cases to sustain Points Nos. VI and VII:

In *Basevi v. Edward O'Toole Co.*, 26 Fed. Supp. 41, the Court at page 43 states:

"In view of the decision of the United States Supreme Court on April 25, 1938, in *Interstate Circuit, Inc., et al. v. United States*, 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. Ed. 1146, it is now a work of supererogation to write a considered opinion on the facts in an equity cause, for its place will be taken by formal findings of fact and conclusions of law, separately stated, under Rules of Civil Procedure, 28 U. S. C. A. following section 723, Rule 52 (a), formerly Equity Rule 70½, Title 28 United States Code, Section 723."

In *Interstate Circuit v. United States*, 304 U. S. 55, 58 S. Ct. 768, the Court at page 56 of 304 U. S. states:

"The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appel-

late court in reviewing an equity case. *Railroad Commission v. Maxcy*, 281 U. S. 82, S. Ct. 228, 74 L. Ed. 717, and cases."

In *Penmac Corporation v. Esterbrook Steel Pen Mfg. Co.*, 27 Fed. Supp. 86, the Court at page 87 states:

II. "In view of the decision of the United States Supreme Court rendered April 25, 1938, on Equity Rule 70½, 28 U. S. C. A. following section 723, in *Interstate Circuit, Inc. v. United States*, 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. Ed. 1146, and under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, it is now a work of supererogation to write a considered and detailed opinion on the facts in what used to be an equity cause and is now called a non-jury cause, for the place of the opinion must now be taken by formal findings of fact and conclusions of law, separately stated and numbered. Title 28 United States Code, Section 723, 28 U. S. C. A. 723."

Also the opinions should here be read in the following cases set forth at the outset in this brief:

*Buck v. Gallagher*, 36 Fed. Supp. 405.

*Gibbs v. Buck*, 307 U. S. 66, 59 S. Ct. 725.

*Buck v. Swanson*, 33 Fed. Supp. 377.

Rule 52 (a) of Rules of Civil Procedure.

*Buck v. Gibbs*, 34 Fed. Supp. 510.

*Interstate Circuit v. U. S.*, 304 U. S. 55, 58 S. Ct. 768.

Therefore, if the view is adopted by this Court that the "inseparability" and the "inducing cause" features of the case, substantially form the final basis for the opinion of the Court of December 28, 1939; and if that opinion is supererogatory; and has been entirely supplanted by the findings of fact and conclusions of law, then there remain only those findings of fact and conclusions of law

of January 25, 1940—a careful reading of which discloses that there exist no grounds whatever for the granting of the permanent injunction (pages 12 to 21 hereof).

The appellants, as stated at the outset, are justified in urging this Court to conclude that the “inducing cause” and the “inseparability” features raised in the opinion were advisedly and purposely eliminated by the Court when it adopted the findings of fact and conclusions of law of January 25, 1940—especially after attention was called to this identical point to the Court below by timely motion that was entertained by the Court (page 28 hereof).

This cause should be reversed and dismissed because the said facts and law of said findings, conclusion and decree, so warrant.

#### **Argument to Sustain Point of Law No. VIII.**

Appellants cannot anticipate whether the Supreme Court will or will not *consider* the “inducing cause” and “inseparability” features, that appellants contend were nullified in the final decision papers as brought forth under Law Points VI and VII. Therefore, for the purpose of argument, appellants will assume that Sections 2 (B) with Sections 2 (A) and 2 (D), deal with the individual copyright owner in his individual rights as distinct from the corporation, association, or combination dealt with by Section 1. If these sections, applicable to the individual copyright owner, are in conflict with the National Copyright Act, then the question remains, whether or not the lower Court committed reversible error when it stated that Section 2 (B) and indirectly 2 (A) were inseparable from the balance of the act and were the inducing cause for its passage.



Assume that the question of "inducing cause" and "inseparability" are legal questions for the Court to decide from the "four corners" of the act in question and not from any extrinsic facts.

With this assumption, the appellants do not agree; but for the purpose of argument appellants will so proceed in reference to Law Point No. VIII.

To appreciate the necessity for the enactment of the bill in question, the Court's attention is called to the following facts of record:

The principal owners of the public rendition rights on musical compositions are 123 music publishing houses, all of which are located in the City of New York, with the exception of one or two (R. Vol. I, 126). These music publishing houses actually own substantially all public rendition rights of the copyrights. The publishers came to own them by assignment over many years from the original copyright owners of the million pieces or more that go to make up the 85% to 90% of the commercially usable music controlled by ASCAP (R. Vol. I, 127). No composer of music is able to place his music upon the market and obtain any financial returns without a publisher any more than the writer of a textbook or a novel could market his book without a publisher. So, when the composer copyrights his music by the payment of \$2.00 and then wishes to have the music published, he goes to one of the publisher members of ASCAP and makes a deal for all the rights in reference to that song as he and the publisher might agree (See contracts, Volume I, 36-45; Volume II, 797-804). Then comes the question of the small public performance rights. If public performance

rights are the subject matter of contract between the composer and the publisher, it is apparent that they are turned over by the publisher and the composer to ASCAP for exploitation (R. Vol. II, 697-705). The result has been that over a period of twenty-five years these rights have been built up by ASCAP, working in conjunction with substantially all the important publishing houses of America (R. Vol. I, 209; Vol. II, 791). The composer may gradually advance into a classification where in time he may receive some remuneration for public performance rights depending on the classification which he may be given from time to time by ASCAP's board of directors. The net funds are divided equally, one-half to the composer members and one-half to the publisher members (R. Vol. I, 70). Under this law point, these facts are material because of the "inducing cause" feature advanced in the case by the lower Court in its opinion.

It is quite obvious, therefore, that those composers who are "in" ASCAP are financially affected each and every time there is an inclusion of another composer member or an enlargement of his classification. That is a mathematical certainty. From the record (Vols. I, 202-7; Vol. II, 924-968) it has been worked out fairly accurately that only approximately 235 composer members receive any substantial sum whatever from ASCAP; 800 members of the 1,100 receive practically nothing (R. Vol. II, 626; 633; 630). Furthermore, it will be noted by the evidence (R. Vol. I, 184; 223-4) and by the contract that ASCAP makes with the composer that he surrenders substantially his future to ASCAP.

Thus, it is apparent that the ASCAP organization is not a benevolent, protective order engaged in the ad-

vancement of any creative art. It has nothing whatever to do with the advancement of music, nor is it an inspiration for any composer. The fact of the matter is and the records of ASCAP show from their lists of members that they have taken in substantially no new composer member for years—perhaps an isolated case or two. The reason is obvious; it is financial. The fewer members the larger the dividends (R. Vol. I, 207-11; 70).

The same is true with the publisher members. The higher classifications receive \$100,000 to \$150,000 per year from ASCAP for public performance rights. There are 20 of the 123 publishers who receive the substantial part of the money (R. Vol. I, 559; 598; 788).

Bear in mind that the sole and exclusive right to fix prices and determine terms and conditions for public performance rights is vested in ASCAP; that it was and is that organization alone which deals in public performance rights in Nebraska; it is quite apparent therefore that the "inducing cause" for the passage of Legislative Bill No. 478 in question was the monopoly. So strong did the ASCAP organization become in Nebraska and elsewhere throughout the United States, that it had the entire radio industry of the nation at its mercy. These facts were brought out by the testimony in this case and are in the printed record (R. Vol. I, 430-2; 439-40). ASCAP demanded 5% of the gross receipts of every radio station in the State of Nebraska (R. Vol. I, 91). This might equal 50% of the net proceeds. In any event, it forced the radio industry to incorporate its own music publishing house, known as Broadcast Music Incorporated, at an expense at the outset of over \$1,000,000. But, with only a small percentage of scattered pieces of commercially

usable music available to BMI, and music that might be used from the public domain, it is apparent that BMI would only have a very small, insignificant, fractional part of the necessary music. ASCAP still controls the vast and substantial amount of the commercially usable music in the United States so far as public performance rights are concerned. The Court so held in its findings of fact (R. Vol. I, 136; 430-1).

"The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places."

Note that the Court said "necessary for the successful operation," and that ASCAP controls those public performance rights.

How can it then be said from the facts in this record that Section 2 (B) of the act in question was the "inducing cause" for the passage of the bill? Is it not more logical to assume that Section 1 of the act, which seeks to dissolve this unlawful combination, was paramount to Section 2 (B)?

Appellants conclude from the record that there existed in the State of Nebraska an unlawful combination dealing in incorporeal rights known as public performance rights; that the unlawful combination was fixing prices in restraint of trade; that such situation was coupled with a public interest; that it was within the police power of the State of Nebraska to remedy the same; that the legislature enacted Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 11,



12, 13 and 14 of the act in question as the necessary remedy for an existing evil (pages 135-150 hereof).

Appellants know without question of a doubt, as the representatives of the people of the State of Nebraska, that the act was passed in order that the unlawful monopoly might be appropriately dealt with should there be any violations of law by it after the act in question became operative.

The protection of the people of the State of Nebraska from the exactions of a price-fixing, monopolistic combination controlling the rendition rights of most all music was the *inducing* cause for the passage of the act.

Regarding the separability of Sections 2 (A), 2 (B) and 2 (D) from the balance of the act, appellants suggest reading the applicable law announced by the United States Courts and the Courts of the State of Nebraska, both of which have repeatedly dealt with the situation.

Furthermore, there is a presumption that the saving clause enacted as part of the law in question was meant to aid in the judicial interpretation that parts of the act might be separated from the balance thereof without destroying the main parts of the act.

The appellants, as the law enforcement officials of the State of Nebraska and the spokesmen for its people, assert before this Court that Sections 2 (A), 2 (B) and 2 (D) (grouped together because they all deal with the individual copyright owner) might either one or all be entirely stricken and separated without the slightest interference, directly or indirectly, with the enforcement or the interpretation or the application of the many remaining provisions of the act.

Appellants cite the following cases to sustain Law Point No. VIII:

In *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, the Court at Page 312 of 298 U. S. states:

"In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?"

In *Dorcy v. State of Kansas*, 264 U. S. 286, 44 S. Ct. 323, the Court at Page 289 of 264 U. S. states:

"A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. *Berea College v. Kentucky*, 211 U. S. 45, 54-56, 29 Sup. Ct. 33, 53 L. Ed. 81; *Carey v. South Dakota*, 250 U. S. 118, 121, 39 Sup. Ct. 403, 63 L. Ed. 886. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

In *re Lew Agnew*, 89 Neb. 306, 131 N. W. 817, the Court at Page 312 of 89 Neb. states:

"If some provision should be found which is violative of the constitution, that fact would not necessarily render the whole act void. In 36 Cyc. 983, it

is said in the text: 'The weight of authority is to the effect that, where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce'—citing a number of authorities in the note. See, also *Standard Oil Co. v. State*, 117 Tenn. 618; *Austin v. State*, 101 Tenn. 563; *State v. Lancaster County*, 6 Neb. 474; *State v. Lancaster County*, 17 Neb. 85; 3 Neb. Syn. Digest, p. 2964."

In *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, the Court at Page 225 of 63 Neb. states:

"That a part of an act, or even a part of the same section of an act, may, under some circumstances, be held unconstitutional, without invalidating the remainder, is elementary. This court has said that 'Where a statute contains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld, \* \* \* except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder.'"

In *Logan County v. Carnahan*, 66 Neb. 685, 92 N. W. 984, the Court at Page 694, Syllabus No. 8 in the opinion filed on rehearing states:

8. "Inducement. Where a provision of an act is declared invalid because contravening some provision of the constitution, the statute will yield only to the extent of its repugnancy to the constitution; and if the remainder is found complete and capable of enforcement, notwithstanding the invalid portion, it will be held valid unless the unconstitutional part was manifestly an inducement to the legislature for the passage of the remainder."

In *Merrill v. State*, 65 Neb. 509, 91 N. W. 418, the Court at Pages 517 and 518 of 65 Neb. states:

"It is also urged that because a part of the act has been declared invalid, the whole must fall, on the proposition that the invalid part was an inducement to the passage of the remainder. We are not impressed with the force of this argument. The act is complete, symmetrical and perfect in all its parts, without an appropriation for the salary of the deputy food commissioner. Nor can we believe that the attempted appropriation of the salary was an inducement to the passage of the act."

In *Petersen v. Beal*, 121 Neb. 348, 237 N. W. 146, the Court at Page 353 of 121 Neb. states:

"The general rule upon the subject is that, where there is a conflict between an act of the legislature and the Constitution of the state, the statute must yield to the extent of the repugnancy, but no further. (Citing cases.) If, after striking out the unconstitutional parts of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by courts and made effective."

In *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857, the Court at page 620 of 61 Neb. in Syllabus No. 2 states:

2. "If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete and capable of execution, it will be upheld and enforced, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder."



In *State v. Price*, 129 Neb. 433, 261 N. W. 894, the Court at page 434 of 129 Neb. in Syllabus 3 states:

3. "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld."

In *State v. Ure*, 91 Neb. 31, 135 N. W. 224, the Court at page 32 of 91 Neb. in Syllabus No. 7 states:

"Where a portion of a statute is in violation of the constitution, if the objectionable part was not an inducement to its passage and may be eliminated without interfering with the general purpose of the act, and the remainder of the act is valid and capable of being enforced, the act will be upheld."

In *State v. Stuht*, 52 Neb. 209, 71 N. W. 941, the Court at page 217 of 52 Neb. states:

"Another test to be applied here is, may the constitutional and unconstitutional portions of the law in question be separated, and is the former so complete within itself and independent of the latter that the former will be operative and can be enforced without the latter? If so, the former will be upheld and the latter disregarded or rejected. The foregoing is the rule announced and enforced by this Court."

In *Sunderland Bros. Co. v. Missouri P. R. Co.*, 101 Neb. 119, 162 N. W. 494, the Court at page 122 of 101 Neb. states:

"If the provisions of the act relating to interstate commerce can be disregarded and still leave a valid workable law, we see no reason why the act cannot be upheld so far as it applied to commerce

within the state. It is true that some courts have held in somewhat similar circumstances that such a law will not permit a separation or division and the whole act must fall, but other courts take the view that, though a statute of this nature may be void and inoperative as a regulation of interstate commerce, it may be valid and enforceable with reference to transportation within the state."

In *Union Pacific Railroad Co. v. Sprague*, 69 Neb. 48, 95 N. W. 46, the Court in Syllabus 8 states:

8. "If the valid and invalid parts of a statute are severable and it is apparent that the latter was not an inducement to the adoption of the former, the law will be upheld and enforced to the extent that it is in harmony with the constitution."

In *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, the Court at page 241 of 278 U. S. states:

"But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.' The question is one of interpretation and of legislative intent, and the legislative declaration 'provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.'"

The appellees were ready, when the act was passed, with the long complaint to restrain and enjoin the enforcement of the act (R. Vol. I, 1-97). The act was signed and became a law on May 17, 1937; and on June 7, 1937, the action to restrain and enjoin the appellant state officials was instituted by the appellees in the Federal Court. So drastic are the provisions of the final, permanent injunctive decree against the appellants that

an opinion could not be written by the Attorney General of the State of Nebraska interpreting the act for any county attorney or state official preparatory to action without violating the terms of that final decree (pages 19-21 hereof).

From the foregoing Nebraska cases on the question of "inducement" and "inseparability" of Sections 2 (A), 2 (B) and 2 (D), from the balance of the act, it is clear that the state court would most certainly have followed these numerous decisions on the subject that have been above quoted, if it had an opportunity to do so.

Therefore, in reference to Law Point No. VIII, if the Court considers that the "inducing cause" and "inseparability" features are before the Court for decision, then under the decisions, the Court should inquire into the facts de novo and rule that Section 2 (B) was not the inducing cause for the passage of the act; and that Sections 2 (A), 2 (B) and 2 (D), because dealing with individual copyright owners as distinguished from an unlawful combination, are separable from the balance of the act.

#### **Argument to Sustain Point of Law No. IX.**

Under Law Point No. IX, the appellants have cited three federal cases and two Nebraska cases that decide the following very important points: The questions of "inducing cause" and "inseparability" are special defenses which must be pleaded and which were not. Furthermore, they were never raised in the course of the trial at any time by either side in the case until the Court itself announced both those features in its opinion of December 28, 1939 (pages 9-12 and 22 to 27 hereof).

Within proper time, the appellants filed a motion for rehearing because these features were, as appellants believed, erroneously injected into the case in the said opinion. Affidavits of the majority of the legislators were obtained. These men each stated that Sections 2 (A) and 2 (B) were each not the inducing cause for his affirmative vote, but it was the anti-monopoly feature and the enforcement provisions of the act against the monopoly that caused each one to vote as he did affirmatively, and thus placed the law into force and effect as a part of the police power of the State of Nebraska, to prevent further violations of law (pages 53-6 hereof).

The Court had made its findings of fact, conclusions of law, and decree on January 25, 1940 (pages 12 to 21 hereof), prior to this motion for rehearing and the filing of these affidavits. Then the Court's attention was challenged in the motion for new trial (page 28 hereof) to the fact that the findings of fact, conclusions of law, and decree failed to mention the "inducing cause" and "inseparability" features in the opinion. The Court overruled the motion for new trial; and, in so doing, it adopted finally and conclusively the findings of fact and conclusions of law without those provisions (p. 57 hereof).

Had the Court by *error* or *mistake* omitted those features from its findings of fact, it had the opportunity to make the correction at the hearing on the motion. But the Court did not choose to do so. Therefore, the appellate court need not do so, it would seem. However, the appellate court might wish to permit such modification or changes in the decree of the lower Court as would upon such grounds alone allow the courts of the State of Nebraska to pass their judgment upon the effect of those features, on the validity of the whole act.



The appellants again call the Court's attention to the fact that they believe the lower Court has eliminated the feature of "inducing cause" and "inseparability" from further consideration in the case. However, if the Supreme Court of the United States is inclined, in reviewing this matter, to itself inquire into the matter of "inducing cause" and "inseparability," then it is appellants' contention that under Point No. VIII hereinabove, there is ample authority, both of fact and law, to justify the Court in holding that Sections 2 (A), 2 (B) and 2 (D) were separable from the balance of the act and were not the inducing cause for its passage.

But, should the Court feel that the cause should be reversed and remanded on the "inducing cause" and "inseparability" features, then appellants contend the Court should at least modify the injunctive decree to permit the state court to pass upon those features in order to give validity to the balance of the act.

Appellants cite the following cases to sustain these views:

In *Bresee v. Preston*, 91 Neb. 174, 135 N. W. 544, the Court at page 176 of 91 Neb. states:

"Of course, under section 136 of the code it is unnecessary to plead the validity of a statute, because it is a presumption of law. But, when it is claimed that facts exist which rebut the presumption of law, the facts which are claimed to exist should be pleaded so as to inform the court of what is the real issue. Some act of omission or commission by the legislature in conflict with the provisions of the constitution with reference to the manner of passing bills must be relied upon to support this allegation. This is a matter to be proved, and while under our

former decisions the court will take judicial notice of the legislative journals, this notice cannot supply the want of a specific plea of the fact upon which the pleader relies. The Supreme Court of the United States holds: 'Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make these facts a part of the complaint for the purpose of giving jurisdiction to a federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge.' '' (Citing cases.)

In *Glenn v. Field Packing Co.*, 290 U. S. 177, 54 S. Ct. 138, the Court at pages 178 and 179 of 290 U. S. states:

"Upon the facts found, the decision appears to be supported by principles laid down by the Court of Appeals of Kentucky, but, so far as the application of the state Constitution is concerned, the ultimate determination of the validity of the statute necessarily rests with that court. Further a change in circumstances may create a situation different from that to which the opinion below was addressed.

"In order to prevent the possibility that the decree may operate injuriously in the future, the decree will be modified by providing that the members of the state tax commission, or that commission, may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state Constitution, or that by reason of a change in circumstances the statute may be regarded as imposing a valid tax."

In *Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727, the Court at pages 425 and 426 of 292 U. S. states:

"The taxation of the documents being without warrant in the statute, there is no duty to determine

whether the constitution would be infringed if the meaning were something else. As to that we do not indicate an opinion, even by indirection. It will be soon enough to set a value upon the arguments of counsel when a statute is before us that requires us to choose between them. At the same time the parties to the controversy should have adequate protection in the possible contingency of a decision by the state Supreme Court at variance with ours in respect of the meanings of the statute, a meaning that will then be declared with ultimate authority. *Hartford Accident & Indemnity Co. v. Nelson Mfg. Co.*, February 5, 1934, 291 U. S. 352, 54 S. Ct. 392, 78 L. Ed. 840. There should be an appropriate opportunity in such circumstances to terminate or modify the restraints of the decree. There should also be an opportunity to renew the litigation in respect of the issue of constitutional validity, now held to be irrelevant. The reservations proper to that end will follow the practice indicated in *Glenn v. Field Packing Co.*, 290 U. S. 177, 54 S. Ct. 138, 78 L. Ed. 252, and *Wald Transfer & Storage Co. v. Smith*, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed.

"In conformity with those decisions, the decree will be modified by striking therefrom any conclusion of law or other adjudication as to the validity of the Documentary Stamp Tax Act of Florida under the Constitution of the United States, and by adding a provision, that the parties to the suit or any of them may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been then construed by the highest court of Florida as applicable to the transactions in controversy here."

In *Wald Transfer & Storage Company v. Smith*, 290 U. S. 602, 54 S. Ct. 227 (on rehearing), the Court stated:

"Upon consideration of the petition for rehearing, the decree entered herein by this Court on No-

venember 13, 1933, is amended so as to provide that the decree entered in this cause by the District Court, as especially constituted, be modified by providing that the appellant may apply at any time to the District Court, by bill or otherwise, as it may be advised, for a further order or decree, in case it shall appear that the state court shall have construed the applicable state statute as not authorizing the state commission to enter the order challenged in this proceeding."

In *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065, the Court at page 578 of 56 Neb. states:

"When an act is legal or illegal because of the existence or non-existence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue. Moreover, from certain special findings it is clear that the court did not act on this averment, so that we are relegated to an investigation of the legality of the ordinance, assuming that it was regularly passed."

59 C. J., Section 740, Page 1200:

"Where it is claimed that an act is void because, in its substance, it is violative of the fundamental law, or ultra vires the government, it is sufficient to allege generally that it is invalid; but where the objection to the validity of the law is that it was not regularly and constitutionally passed and adopted, the defect in the proceedings must be specifically pleaded."

"Where the objection to the validity of a law springs out of the failure of the legislature to comply with the provisions of the constitution, which is not apparent upon the act itself, it should be distinctly set forth in the pleadings, or in this case in the return. The adverse party should have an oppor-



tunity to controvert the allegation, and to prove a due conformity on the part of the legislature with the requirement of the constitution."

It is upon the authority of these cases that the appellants stated at the outset under this Law Point No. IX that these objectionable features found in the opinion for the first time, should have been raised in the pleadings, and not having been made an issue in the case below, they should now be ignored on appeal. Also the lower Court virtually struck them from further consideration when it entered its findings of fact and conclusions of law and ultimate decree after its attention was called to all the facts and the law and supporting affidavits of the legislators were furnished the Court.

Thus appellants contend under Point No. IX that the cause should be reversed and dismissed, unless the Court wishes to save the one point to the state court in reference to "inducing cause" and "inseparability," in which event the foregoing cited cases are ample authority for this Court to so act.

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### CONCLUSION

Appellants, as the state law enforcement officers, prefer the cause be reversed and dismissed. If so, the result would be that all features would be tried out when and if they arose. Each would be met and decided upon the facts and circumstances and experiences gained from a practical operation of the act.

So far there were before the lower Court, and now before the Supreme Court, no individual appellees that have any standing or right to question Section 2 (A), (B)

or (D), because all appellees were and are a part of the unlawful conspiracy. They each have testified they wish to so remain and will not conform to the act.

Under such circumstances, and the others which appellants have brought to the Court's attention in this brief and record, the cause should be reversed and dismissed.

The appellants believe the very finest results for all parties concerned will be accomplished by so doing.

Appellants, as law enforcement officers, sincerely hope that no action under this law will be required. None was threatened before nor since the suit was started. Appellees sought no advice, suggestions nor ruling of the appellants before they started their suit. The trial showed no irreparable loss nor damages resulting from the passage of the act. The act clearly provides for most complete protection of all rights in any action that might be instituted under the act against anyone.

There is no actual interference with the Copyright Act before this Court for decision. If Sections 2 (A), (B) or (D) are interferences it will be proper for a defendant who comes properly under those provisions to raise that question in a proper proceedings as a defense. That time may never come. Legitimate copyright owners may wish to comply with all the terms of the act. Owners of rendition rights may find it beneficial and profitable to do so—if the monopoly is dissolved and the rights revested in the composers and the various music publishing houses as owners, where they legally belong.

The hypothetically anticipated action by the state, feared by appellees in this case, should not be made the

basis for judicially destroying a very worthwhile state legislative bill covering a subject that the record proves required just such legislative action.

Respectfully submitted,

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*Attorney General of Nebraska.*

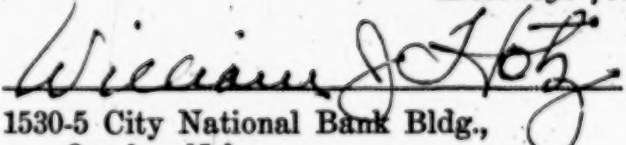
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**Nebraska Legislative Bill No. 478**

AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving pic-

ture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio rebroadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

*Be it Enacted by the People of the State of Nebraska:*

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, as-

sociation, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful; from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound pro-

ducing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2 (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17 U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and



publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer, or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm

or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25c) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firm or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the State Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by

any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, shall be and is hereby authorized to receive, broadcast and rebroadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and noncollectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio rebroadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or rebroadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited

from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, any herein declared noncollectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exacting herein declared unlawful and noncollectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or reproduction apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawfully by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and noncollectible by the terms of this Act.



(B). When such theatre or theatres, moving picture houses or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section I hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and noncollectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio

receiving, radio broadcasting or radio rebroadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instru-

mental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or rendition by radio broadcast, radio rebroadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1, hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall,

for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than \$5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any



combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the

terms hereof by any unlawful combination, as defined in Section 1 hereof; or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all, documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the

case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of \$100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.



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